EDITOR'S NOTE

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95-5257

No.95_____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ISMAEL ORNELAS-LEDESMA, AND SAUL ORNELAS,
Petitioners.

v.

UNITED STATES OF AMERICA,
Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Supreme Court, U.S.
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PARTIES TO THE ACTION BELOW

The parties in the United States Court of Appeals for the Seventh Circuit include petitioners Ismael Ornelas-Ledesma and Saul Ornelas and the United States of America. The causes below in the second appeal are listed as 94-3349 and 94-3350. Both cases were joined for appeal by order of the Seventh Circuit. In the first appeal, both petitioners' cases were numbered as 92-CR-243.

OPINIONS BELOW

This petition seeks review of a published opinion by the United States Court of Appeals for the Seventh Circuit, United States of America v. Ismael Ornelas-Ledesma and Saul Ornelas, 16 F.3d 714 (7th Cir. 1994), decided February 10, 1994, and United States of America v. Saul Ornelas, Ismael Ornelas Ledesma, an unpublished decision and order dated April 18, 1995.

The first magistrate-judge's recommended order is dated February 12, 1993. The original decision of the district court denying the motions to suppress is dated March 9, 1993. The published opinion of the court of appeals is dated February 10, 1994. In the first appeal, the circuit court of appeals vacated the judgments of conviction and remanded the case to the United States District Court for the Eastern District of Wisconsin for further findings.

Upon remand, the magistrate-judge recommended suppression of the seized drugs. The magistrate-judge's post remand

recommended order is dated March 29, 1994. The district court's decision after remand is dated September 20, 1994.

The district court disagreed and reinstated the convictions. A timely appeal followed and the circuit court of appeals affirmed the convictions in an unpublished decision and order dated April 18, 1995. This appeal follows. All decisions are appended.

JURISDICTION

The statutory provision conferring jurisdiction of this Court to review the judgment below by writ of certiorari in a federal criminal case is 28 U.S.C. §1254. The court of appeals has appellate jurisdiction based on 28 U.S.C. §1291. The jurisdiction of the district court is based on 18 U.S.C. §3231.

CONSTITUTIONAL AND STATUTORY PROVISIONS

FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

FIFTH AMENDMENT TO THE UNITED STATED CONSTITUTION:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual

service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Milwaukee County Sheriff's detective, Michael Pautz, was conducting drug interdiction activities at 8:30 a.m. in the morning of December 11, 1992 (R.49:29). He observed a 1981 Oldsmobile bearing California plates parked in front of Room 4 of the Suburban Motel, 4600 S. 27th St., Milwaukee, Wisconsin. Upon checking the motel registry, (R. 49:26) he learned that Ismael Ornelas, from **California**, was registered in Room 4 (R.49:31).

Pautz radioed his dispatcher and requested him to "run" the California plates to determine the car's owner (R.49:28). The dispatcher reported that the car was registered to "Miguel Ornelas" with either a middle or second last name of "Ledesma." He was unsure if the "Ledesma" was before or after the "Ornelas." (R.49:29). The address for the owner was 830 N. 16th Street, San Jose, California (R.49:5).

Approximately 20 minutes later Det. Don Hurrle met Pautz across the street from the motel (R.49:33). A Drug Enforcement Administration Narcotics and Dangerous Information

Systems check (hereinafter referred to as NADDIS) was then made for the names "Miguel Ledesma Ornelas" from San Jose, California and "Ismael Ornelas". (R.49:33).

The NADDIS computer check showed a "hit," (an indication of some prior contact) for "Miguel Ledesma Ornelas" AKA Lemus-Ledesma, Miguel, with a DOB of 09/29/45, 150 lbs., Hispanic male from El Centro, California as being a heroin dealer (R.49:39). The NADDIS check also showed that an Ismael Ornelas, Jr., from **Tucson, Arizona** was a 1000-kilo a month cocaine dealer (R.49:35-36). A wanted check was made on both names and neither were wanted.

The computer information given to Pautz regarding the owner of the car did not include a date of birth (R.49:35-36). Pautz did not ask for a check on the car's registered owner to determine if the two persons listed in the DMV (California Department of Motor Vehicles) and NADDIS checks were one and the same, nor did he attempt to determine the age of the DEA information or to further obtain identifying information such as height and weight (R.49:56,60,61).

Pautz's suspicions were raised because the car was from a "drug source" state, the persons were of Hispanic descent, no advance reservations were made for the motel, and because the NADDIS check showed that a person bearing the name Ismael Ornelas was a drug dealer (R.49:54). Pautz and Hurrle called for and obtained a "drug sniffer" dog (R.49:37).

After moving across the street to a lot next to the

motel, the officers observed two people exit the motel. One individual loaded the trunk with luggage (R.50:331). One of the individuals entered the car on the passenger side and the other went into the motel office (R.50:371). The second individual returned to the car and entered on the driver's side (R.50:305). At that point, the officers moved their own vehicles to both sides of the suspect vehicle (R.50:306).

Hurrle asked if there were any drugs in the car. Both purportedly, (almost simultaneously) stated, "No". (R.50:307). It is claimed that both gave Hurrle permission to look through the car (R.50:307). Before conducting the search of the vehicle, the appellants were asked to produce identification. Ismael Ornelas Ledesma produced a **California** identification showing his residence as Martinez, California (R.50:306-307).

Det. Luedke arrived at the scene with his drug dog. He checked the interior of the car without use of the dog and felt a "somewhat loose" area near the arm rest of the rear passenger side. He suspected the possibility of drugs behind the panel. Luedke testified that he then went to the vertical area of the car body where the passenger door closes, (the door jam), and observed a plastic vent cover, held in place with one "rusted" Phillips screw (R.50:214-221).

Luedke believed that the presence of rust on the screw was evidence that it had been recently removed. (The other screws appeared rust-free).

Luedke removed the Phillips screw and the vent cover and

discovered a paper bag containing suspected cocaine (R.49:156-157). Unable to remove the bag through the vent, he popped open the "somewhat loose" panel, toward the interior of the car, and removed the drugs through this opening.

After the arrest, custodial statements were made in which Ismael Ornelas-Ledesma made inculpatory statements.

The petitioners were charged in a one-count indictment with possession with intent to distribute approximately 2,000 grams of cocaine in violation of §21 U.S.C. §841 (a)(1) and §18 U.S.C. §2. (R.4.)

Three days of evidentiary hearings were held, wherein the petitioners challenged the stop, the search and the statements. The magistrate judge entered an order denying the appellants' pre-trial motions to suppress. The order of the magistrate judge entered on the 12th day of February, 1993, (R. 34) was affirmed on different grounds by the trial court in an order entered on the 9th day of March, 1993, (R. 40). Additionally, the magistrate judge denied the appellants' motion to compel discovery in an order dated January 15, 1993, (R. 23).

The petitioners pled guilty to count one of the indictment. This was a conditional plea pursuant to Rule 11 (a)(2) F.R.Crim.P. (R. 41).

On March 11, 1993, the petitioners filed a motion for reconsideration before the trial court, requesting a review of its decision and order of 3/9/93, (R.42) referred to above,

and to further consider an inspection of the suspect vehicle. The trial court orally denied the motion on March 11, 1993, (R. 52).

A judgment of conviction was entered on March 11, 1993 (R. 41). Saul Ornelas was sentenced on the 28th day of May, 1993, to 63 months for count one, (R.45). A notice of appeal was filed on the 7th day of June, 1993, (R.47). Ismael Ornelas-Ledesma was sentenced to 60 months, on May 20, 1993, (R. 38) and filed a notice of appeal on May 27, 1993. (Ismael Ornelas's Docket, R. 41).

In the petitioners' first appeal, the United States Court of Appeals for the Seventh Circuit reversed the judgment of the district court in a decision and order dated February 10, 1994. The order remanded the matter to the trial court for further proceedings to determine whether the inside panel secreting the drugs was indeed loose.

The court of appeals reversed because the district court ignored disputed testimony regarding the credibility of the arresting officer.

The district court had not personally heard the challenged testimony, had not personally inspected the car, as requested by petitioners, and did not order the officer, whose credibility was challenged, to appear before him to testify as to the challenged matters.

The magistrate judge disbelieved a closely related portion of the testimony of the arresting officer concerning

whether the vent cover in the doorjamb of the car was held in place with a "rusty" screw.

After the evidentiary hearing concerning the "rusty" screw, petitioners requested that the screw be produced for examination. The screw was produced by the officer and examined by the magistrate judge and later by the court of appeals. The court of appeals, echoing the magistrate judge, stated, "The screw is in the appellate record and we have looked at it ourselves. There is not the slightest trace of rust or of anything that looks like rust." 16 F.3rd at 719.

Nonetheless, the magistrate judge upheld the search on the basis of inevitable discovery. The district court, while not relying on the inevitable discovery theory, upheld the search on the basis of the confluence of three factors;

The first was the closely related testimony by this same officer concerning the "somewhat loose" panel. The second was the fact that the car in question fit a "drug courier profile." It was an older two-door GM car registered in California, driven by two people who checked into a motel. The individual did not make reservations. The third was the comparison of the name of the person registered in the motel and the registered owner of the car. The last name supposedly (erroneously), was the same as names found in the government's NADDIS (Narcotics And Dangerous Drugs System) computer.

The court of appeals rejected the inevitable discovery theory because the government failed to defend it on appeal.

It stated that the drug courier profile "seems only a little better than a dragnet for Hispanics," and it noted that the secondary literature "depicts NADDIS as an unselective, unweeded repository of unsubstantiated allegations, often dated." Ornelas, 16 F.3d at 717.

It likened the NADDIS information to that of an informant not known to be reliable. Ornelas, 16 F.3d at 718. The court acknowledged that the dispatcher reversed the two last names but thought that that was just the sort of error one might expect. It was impressed, however, by the fact that there were not one but two hits, notwithstanding the one hit showed an Ismael Ornelas from Arizona and the petitioner was from California.

It also noted that the other name was from El Centro, California, a location, hundreds of miles from the address of the registered owner of the car. (The record shows it to be six hundred miles). The court remanded for a determination concerning whether the panel was indeed loose as testified to by the officer.

That determination was to be made by one of three ways; the district court judge himself hearing the testimony of the officer, an inspection of the automobile, or the magistrate judge making a finding of credibility as to that portion of the testimony concerning the "loose panel."

Upon remand, the matter was referred back to the magistrate judge. He found that "NADDIS reports are so

convoluted and mismatched that they are of little probative value in the probable cause determination." (A-103). He similarly was unimpressed by the "questionable drug courier profile," (A-103). He made the finding "except for the rule of Falsus In Uno Falsus In Omnibus, I have no reason not to believe the panel was loose. However, the loose panel alone, given the age of the Oldsmobile is not probative evidence of the fact it necessarily had been recently removed." (A-102). It was a 1981 car.

His recommended order of March 29, 1994 granted petitioners' motions to suppress the cocaine. On September 20, 1994, the district court issued an order not adopting the recommended suppression by the magistrate judge.

The case was again appealed. The same panel, Chief Judge Richard Posner writing for the court, this time affirmed the decision of the district court denying petitioners' motions to suppress.

The brief opinion, (App:147-48), less than two pages, states,

> Our review is deferential. The district judge's finding of probable cause may be set aside only if clearly erroneous. We no not find clear error. The district judge's opinion, although brief, adequately reviews the circumstances on which the decision to search the car was based and explains why taken as a totality they gave the officers probable cause to conduct the search. The judgment of the district court must therefore be, and it is affirmed.

ARGUMENT I. IN NON-WARRANT CASES, AN APPELLATE COURT SHOULD CONDUCT A DE NOVO REVIEW CONCERNING REASONABLE SUSPICION TO STOP AND PROBABLE CAUSE TO SEARCH.

Certiorari should be granted to end the conflict among the circuits regarding the appropriate appellate standard of review of the ultimate legal conclusion in non-warrant cases. Most circuits continue to adhere to a de novo standard of review for conclusions of law and the clearly erroneous standard for findings of fact. Since 1992 the Seventh Circuit has applied a clearly erroneous standard for both findings of fact and conclusions of law in non-warrant cases.

Petitioners had argued in each appeal to the Seventh Circuit that a de novo standard of review for the ultimate legal determination is required.

In the first appeal, the court of appeals reversed because it had serious concerns about the propriety of the district court making credibility determinations in the absence of specific findings by the magistrate judge. The magistrate judge found the related testimony concerning the "rusty screw" incredible, because of the condition and appearance of the screw later produced in court. He had not made a specific finding of fact about the credibility of the testimony regarding the "somewhat loose" panel.

The district court, having only read the testimony of one officer, made the finding, "This reasonable suspicion became probable cause when Officer Luedke found that the right door

panel of the car was loose, leading him to suspect that the panel had been recently removed and that contraband was hidden inside. (Id. at 6-7; Transcript of Off. Luedke's Testimony at 15-16." (App.117).

One of petitioners' counsel had personally inspected the panel but found that it was not unlike the other panels and requested the district court, together with all counsel, to conduct a personal inspection of the panel. The district court rejected this suggestion, later made by the court of appeals in its remand order (48:4-5):

> The magistrate judge initially concluded, "the records disclosed no evidence from which Luedke could conclude that a hidden panel contained contraband (App.136)." The Court finds that it can and did rely upon what Officer Luedke stated. The fact that there had been a request in this motion for reconsideration for an inspection of the automobile by the Court and counsels--Mr. LeBell having done so and found that his inspection disclosed that there wasn't the loose panel, or that none of the panels--or that the particular panel, the specific panel, that was testified to by Officer Luedke as being loose was not loose and not apparently somewhat loose upon being physically felt. That examination the Court finds is not necessary because regardless of what the Court would find at the --any subsequent inspection, the fact of the matter is that the records reviewed by the Court and the testimony of Officer Luedke is one which discloses that in his estimation and his opinion and by his calculation and his view and his belief when--as he testified he felt the panel or observed the panel and engaged the panel, that it appeared, quote, to be--or didn't appear but physically felt like it was somewhat loose, close quote.

The court of appeals vacated and reversed because "we do not know whether Luedke's testimony about the door panel should be believed." (App-156). The remand was for the

purpose of making the factual determination of whether it was in fact loose, and then the legal determination whether a loose panel, the NADDIS information, and the drug courier profile add up to probable cause to believe there were drugs secreted in the car's body, such as to allow the officers to dismantle the car. (App-157).

The court of appeals had serious concerns about the propriety of a district court rejecting the credibility determinations of a magistrate judge under 28 U.S.C. 636 (b)(1) and substituting its own dispositive findings. "[T]o do so without seeing and hearing the witness or witnesses whose credibility is in question could well give rise to serious questions which we do not reach." N.7. See United States v. Raddatz, 447 U.S. 667 (1980).

Upon remand, the trial court was directed to inspect the car, have the officer testify again before the district court, or refer the matter to the magistrate judge for his credibility determination of Officer Luedke's testimony concerning the "somewhat loose panel." (App.156-57).

The district court choose the last option. The magistrate judge made the credibility determination in favor of the officer. It was less than a sterling endorsement. The magistrate judge did not articulate why he found the officer credible.

The totality of the magistrate judge's credibility determination is as follows:

> Officer Luedke's testimony as to the screw was found by this Court to be incredible, in light of the undisputable condition of the screw itself. Nonetheless, except for the rule of Falsus In Uno Falsus In Omnibus, I have no reason not to believe the panel was loose. Thus, I accept as credible Luedke's testimony that the panel was loose. (App.102).

The magistrate judge then went through a detailed analysis of seven other decisions concerning door panels and cavities used to secret drugs. He made a determination that probable cause was lacking to reasonably suspect the presence of drugs in the body cavity.

Not deterred, the trial court merely referred to the cases cited by the magistrate. The trial judge did not examine the cases. Instead, he came to a contrary legal conclusion concerning the existence of probable cause. "The Court acknowledges that the issue is a close one, but weighing the evidence "not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement," See Texas v. Brown, 460 U.S. 730, 742 (1983), the Court is compelled to reach the same conclusion." (App.97) (The same conclusion it had reached a year earlier).

In the first appeal, the court of appeals rejected petitioners' argument that a de novo standard of appellate review was the appropriate standard of review (App.154):

> Although the question is close, we conclude that the district court did not commit clear error in holding that there was a lawful stop. And clear error is the test; the proposition that review of a district court's determination of reasonable suspicion (if it is a Terry stop) or probable cause (if it is an arrest, search, of seizure) is

> plenary, embraced in such cases as United States v. Jaramillo, 891 F.2d 620,626 (7th Cir.1989), is no longer tenable after United States v. Spears, 965 F.2d 262 (7th Cir. 1992), where, overruling inconsistent precedents, this court held that the standard for judicial review of determinations of probable cause was clear error. There is no basis for distinguishing in this regard between probable cause and reasonable suspicion. They are adjacent points on a continuum.

In the post remand appeal, petitioners once again argued that they were entitled to a de novo standard of review concerning the ultimate legal determinations of the district court. That argument will be reproduced here.

Two years ago year, this circuit formulated a uniform standard of review of "clear error" for Fourth Amendment probable cause cases, to put an end to the "complete confusion" which then existed in this circuit by virtue of the varying standards announced by different panels. United States v. Spears, 965 F.2d 262 (7th Cir. 1992). Four active judges voted to rehear the case, but a majority voted not to rehear the case pursuant to Circuit Rule 40 (f).

Spears announced that the new rule would apply to both warrant and non-warrant cases. Id. at 269. As a starting point, the Spears court looked at Illinois v. Gates, 462 U.S. 213 (1983) and Massachusetts v. Upton, 466 U.S. 727 (1984)(per curium) for its rationale. Upton, at 733, stated, "A deferential standard of review is appropriate to further the Fourth Amendment's strong preference for searches conducted pursuant to a warrant." The test would be if the evidence produced "a substantial basis" for the issuance of the

warrant. Id. at 733.

Spears, however, refused to acknowledge a standard between clearly erroneous and de novo, stating that in warrant cases, review would be for clear error. Id. at 270. Having said that, it went on to state:

> Because there is little to distinguish a magistrate's probable cause determination in a warrant case and a district court's probable cause determination in a non-warrant case, appellate review should be the same for both. In warrant cases, the magistrate is the front-line judicial officer making the initial determination. In non-warrant cases, it is the district judge who makes the initial determination, who asks the same question the magistrate asks in a warrant case: is there probable cause...It is the frontline officer in both cases who conducts the initial inquiry, who concludes there is or there is not probable cause, and an appellate panel should not substitute its judgment in either case. Id. at 270.

Thus, the genesis of the rule stemmed, in part, from the Supreme Court who wanted to encourage police to get warrants by making it more difficult to reverse the magistrate who issued the warrant. Gates at 237.

The standard of review, however, which a reviewing court was to accord a magistrate in a warrant case, was whether the magistrate had a "substantial basis for..concluding that a search would uncover evidence of wrongdoing." Id. at 236. There is no justification for the more deferential "clearly erroneous" standard, given the Supreme Court's clearly articulated standard of review.

The rationale asserted in Spears is that under Illinois v. Gates, 462 U.S. 213 (1983), reviewing courts are to give deferential review of the findings of fact made by the frontline magistrate who heard the affiant.

The Spears court rationale that there is little difference between a warrant and non warrant case is erroneous for two reasons. In a non-warrant case the rationale expressed in Gates, to encourage warrants, is not applicable. In non-warrant cases the reviewing court's decision should be subject to plenary review to encourage the use of warrants in the first instance.

In non-warrant cases the district judge who makes the decision is generally **not** the person who heard the testimony of the witnesses. In most criminal cases that person is the magistrate judge, who is delegated the responsibility of conducting the evidentiary hearing and making recommended findings of fact and conclusions of law. As this case demonstrates, the district court frequently makes a determination of probable cause in non-warrant cases without having heard a single witness or reviewed the transcripts of the proceedings.

Under 28 U.S.C. §636(b)(1), the court may "accept, reject, or modify, in whole or in part, the [magistrate judge's] findings or recommendations. The district court is required to "make a de novo determination of those portions of the [magistrate judge's] report or specified proposed findings

or recommendations to which objection is made." The problem is that the statute does not spell out the means by which to conduct a de novo review. Is it a new evidentiary hearing, a review of the transcripts, or a remand to the magistrate for the purpose of getting specific credibility determinations if that is the subject of the filed objections?

The front-line judge who, is clearly in the best position to make findings of fact, is the magistrate, in the non-warrant case in which an evidentiary hearing is conducted. In this instance, the magistrate judge who heard all of the testimony, recommended suppression of evidence. The district judge ruled against suppression. Here, the district court heard none of the testimony and reviewed the transcript of only one of the officers' testimony. There were five law enforcement officers who gave testimony, but the court did not order transcripts of their testimony.

Even upon remand, the district court's decision makes no reference to the testimony of the other officers, some of whom were called by the defense. As an example, Sgt. Wiggins, a defense witness, testified that he could get the date of birth of the registered owner of the target automobile via his computer. Accessing this information has been done routinely for the last ten to twenty years (R.45:357-361).

Two officers, including one of the arresting officers, stated they did not attempt to get this information for identification purposes because they did not believe they

could access the material (R.45:327)(R.44:59).

Thus, in the typical non-warrant case, the Gates' rationale of encouraging the use of warrants is inapplicable. The rationale in Spears at 271, is that: "It is the front-line judicial officer in both cases who conducts the initial inquiry, who concludes there is or is not probable cause, and an appellate panel should not substitute its judgment in either case." That rationale is similarly non-existent in most non-warrant cases where, as here, the front line officer is the magistrate judge.

The Spears rationale is seriously eroded, as this case demonstrates, where the district court's decision concerning the ultimate legal issue of suppression is at a variance with that of the magistrate judge.

There is good reason for a reviewing appellate court to exercise plenary review. Appellate courts are far more likely to have a keener appreciation for the more subtle aspects of fairly complicated Fourth Amendment jurisprudence by virtue of the fact that legal reviews are their principle function.

The district courts spend a good part of their calendars conducting trials. They are often overworked and understaffed, and have very short and rigid time-frames in which to make decisions. In a case in which objections to recommended findings are filed, the district court often has but a few days to make its decision prior to the scheduled jury trial date.

In its second response to petitioners challenge to the Spears clearly erroneous standard, the Seventh Circuit was again brief.

> The defendants appeal. Our review is deferential. The district judge's finding of probable cause may be set aside only if clearly erroneous. We do not find clear error. The district judge's opinion, although brief, adequately reviews the circumstances on which the decision to search the car was based and explains why taken as a totality they gave the officers probable cause to conduct the search.

(App.147-48).

This Court, in rejecting the de novo standard of review in warrant cases, stated in Illinois v Gates, 462 U.S. 213, 236-37 (1983):

> "A grudging or negative attitude by reviewing court toward warrants," Ventresca, 380 U.S., at 108, is inconsistent with the Fourth Amendment's strong preference for searches conducted pursuant to a warrant;...Reflecting this preference for the warrant process, the traditional standard of review of an issuing magistrate's probable-cause determination has been that so long as the magistrate had a "substantial basis for ... conclud[ing]" that a search would uncover evidence of wrongdoing, the Fourth Amendment requires no more. (Cites omitted).

By announcing the more deferential clearly erroneous standard of review in non-warrant cases, the Seventh Circuit seriously erodes the incentives which this Court in Gates hoped to foster.

When the standard of review in warrant and non-warrant cases is the same, there is no incentive for the officer or prosecuting attorney to go through the trouble of getting a

warrant.

With the more deferential standard in warrant cases, the close call, and many are close calls, went to the officer who took the time to get the warrant. In United States v. Leon, 468 U.S. 897, 914 (1984), this Court stated:

> Because a search warrant provides the detached scrutiny of a neutral magistrate, which is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer `engaged in the often competitive enterprise of ferreting out crime,' (cite omitted), we have expressed a strong preference for warrants and declared that `in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fall.' United States v. Ventresca, 380 U.S., at 111.

In the Seventh and Eighth Circuits, eliminating the incentive to getting a warrant can only mean that more and more searches and seizures will be conducted without the prior judicial scrutiny which the Fourth Amendment favors.

As this Court has observed in Gates, at 236:

> ...the possession of a warrant by officers conducting an arrest or search greatly reduces the perception of unlawful or intrusive police conduct, by assuring the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search.

When Spears was decided in 1992, three other circuits had ruled that the correct standard of review of a district court's determination of probable cause in a warrantless case was clearly erroneous. Spears cites to United States v. Fox, 902 F.2d 1509,1513 (10th Cir.), cert. denied, -U.S.-,111 S.Ct.199 (1990);

United States v. Williams, 897 F.2d 1430,1435 (8th Cir. 1990); and United States v. Santana, 895 F.2d 850, 852 (1st Cir. 1990).

It noted that the balance of the circuits review either exigent circumstances or consent for clear error. N.4. Two months after Spears was decided, the Tenth Circuit, in United States v. Bloom, 975 F.2d 1447, 1456 (10th Cir. 1992), muddied the waters considerably when it stated:

> We review a district court's findings of reasonable suspicion under a clearly erroneous standard...However, the question of reasonable articulable suspicion...should not be confused with the ultimate determination of reasonableness under the Fourth Amendment, which we review de novo. (Cite omitted). Thus, while the district court's factual findings concerning the agents' suspicion of criminal activity are subject to the clearly erroneous standard of review, (cite omitted), the question of whether such suspicion was reasonable under the Fourth Amendment is a question of law which we review de novo.

More recently, however, the Tenth Circuit while, upholding the clearly erroneous standard for findings of fact noted, "However, the ultimate determination of reasonableness under the Fourth Amendment is a question of law which we review de novo." United States v. Fernandez, 18 F.3d 874,876 (10th Cir. 1994).

In a subsequent First Circuit case, United States v. Rodriguez-Morales, 929 F.2d 780,783-84 (1st Cir. 1991), the court held that it would review mixed fact/law findings under the clearly erroneous test. No deference would attach if the lower court applied the wrong legal standard. Determinations of a "legal" kind would be subject to de novo review.

The Third Circuit stated in United States v. McGlory, 968

F.2d 309,342 (3rd Cir. 1992):

> We review the district court's finding of probable cause under the clearly erroneous standard. If the district court's ruling is plausible in light of the record viewed in its entirety, we must accept it, even if we would have evaluated the evidence differently in the first instance.

In a more recent third circuit opinion, the court stated it would review factual finding for clear error, but would "exercise plenary review over whether these facts create a reasonable inference that the suspect is dangerous and the protective frisk was reasonably calculated to discover a weapon." United States v. Edwards, 53 F.3d 616,618 (3rd Cir. 1995).

The Fourth Circuit applies the traditional clear error test for review of factual findings and an "independent determination on the legality of the arrest." United States v. McCraw, 920 F.2d 224,227 (4th Cir. 1990).

The Fifth Circuit has the same stated standard as the fourth circuit, that of independent review of the district court's conclusions of law. United States v. Richardson, 943 F.2d 547,549 (5th Cir. 1991). Accord, United States v. Martinez-Perez, 941 F.2d 295,297 (5th Cir. 1991). The court would "review de novo the ultimate conclusions of whether the fourth amendment was violated."

The Eighth Circuit stands solidly in line with the post Spears Seventh Circuit. "We review the District Court's findings of probable cause (to arrest) for clear error." United States v. Travis, 993 F.2d 1316,1324 (8th Cir. 1993). However, another panel in United States v. Saffeels, 982 F.2d 1199,1205 (8th Cir.

1992) would review a stop under the clearly erroneous test. However, "We would review de novo the issue of whether a seizure exceeded the permissible scope of an investigative stop." There was no discussion concerning the varying standards.

More recently, in United States v. Bobo, 994 F.2d 524,527 (8th Cir. 1993) the Eighth Circuit stated:

> We review a district court's determination of probable cause under the clearly erroneous standard and will affirm the court's decision unless it is not supported by substantial evidence or is based on an erroneous conception of applicable law, or if, after we consider the entire record, we are left with the firm and definite conviction that a mistake was made.

In the most recent advance sheet in West's Federal Reporter Third Series, dated July 3, 1995, the Eighth Circuit announced, "We may reverse the district court's ultimate ruling on the suppression motion, however, if the ruling reflects an erroneous view of the applicable law.'" United States v. Bell, 54 F.2d 502 (8th Cir. 1995). This suggests a backing away from the clearly erroneous standard stated in Bobo. What constitutes an erroneous view of applicable law is not stated. The Bell court analysis certainly has a ring of "clearly erroneous", but sounds less deferential.

The Ninth Circuit stated that it would review de novo the trial court's determination of the validity of a warrantless entry or arrest. United States v. Huguez-Ibarra, 954 F.2d 546 (9th Cir. 1992) and United States v. Puerta, 982 F.2d 1297,1300 (9th Cir. 1992).

The Tenth Circuit's decision in United States v. Fernandez, 18 F.3d 874,876 (10th Cir. 1994) is at variance with the earlier Tenth Circuit decision cited in Spears. In Fernandez, the court stated the "ultimate determination of reasonableness under the Fourth amendment is a question of law which we review de novo."

The Eleventh Circuit would apply the clearly erroneous standard to findings of fact; "but the application of law to those facts is reviewed de novo." United States v. Adams, 1 F.3d 1566,1577 (11th Cir. 1993).

Given the varying and contradictory standards of review among the circuits, some with their own tangents, this Court should announce a uniform standard of review of a trial court's ultimate legal conclusions in non-warrant cases. Petitioners believe the traditional de novo standard adhered to by the majority of circuits is the appropriate standard for a number of reasons. Historically, that has been the standard of review by appellate courts of conclusions of law, both in federal courts and among the states.

Wisconsin adheres to this standard in its state court decisions. See, State v. Swanson, 159 Wis.2d 431,445, 464 N.W.2d 680 (1991) (court will review "ab initio" whether defendant was under arrest at a particular time) and State v. Murdock, 155 Wis.2d 217,226, 455 N.W.2d 618 (1990) ("independent" review of circuit court's determination of proper scope of search incident to arrest).

Appellate courts traditionally owe their allegiance not to lower courts, but to the law. Their role has been to interpret and

occasionally develop new legal concepts, while at the same time offering lower courts and practitioners a unifying hand among divergent views in the lower courts. De novo review assumes that appellate courts are in at least as good if not better position to correctly interpret a given set of facts as applied to a legal concept.

State trial courts, in particular, frequently make on the spot decisions in the midst of evidentiary hearings without the benefit of briefs, the assistance of law clerks, or the luxury of time to research and reflect. They are often called upon to make crucial decisions in sometimes complex and emerging areas of Fourth Amendment law.

In Wisconsin, circuit courts are often required to rotate into different areas of the law, with the least experienced judges starting out handling misdemeanor and the felony criminal calendars. It is not at all uncommon that appellate courts, staffed by seasoned judges, review decisions made by judges who have frequently had very little criminal law experience.

With rotation forced upon circuit courts, more experienced judges who have spent years handling civil cases, are suddenly thrust into handling criminal cases. It is only logical then, that appellate courts should not defer to the legal conclusions of lower courts. This is particularly true <u>especially</u> in constitutional areas where substantial liberty interests area at stake.

Most of these same arguments apply to federal courts. Trial courts are overworked, understaffed, and often have precious little

time to decide complex issues. With criminal cases taking an ever greater percentage of the courts' docket, the likelihood increases that there will be divergent and conflicting views emerging from different trial courts.

The clearly erroneous standard exalts mediocrity. Why should and appellate court defer to a lower court when it would have decided the case differently in the first instance? If this is the case, the very function of the appellate court is seriously eroded.

The clearly erroneous standard should not be the standard of appellate review in those instances where vital constitutional rights are at stake. Persons facing extended loss of liberty have the right to expect that appellate courts should hold trial courts to the highest standards. Appellate courts should be free to independently review the ultimate legal conclusions of law. Since the Fourth Amendment is national in character, one uniform standard of review should apply for all Fourth Amendment non-warrant cases.

Analytically, the clearly erroneous standard is illogical. Either the defendant's Fourth Amendment rights were violated, or they weren't. Those rights should not have to be clearly violated for an appellate court to reverse. Under a common definition of clearly erroneous, the appellate court would even be able to disagree with the lower court, if it were the court of first instance, and still not reverse. This defies logic.

It is petitioners belief that a Fourth Amendment incursion should result in remedial action by the courts. It shouldn't matter whether the trial court's decision is clearly wrong or just

plain wrong. What matters is the conduct of the police, not the judiciary.

Until and unless the remedial purposes of the exclusionary rule are scrapped, appellate courts should continue to analyze cases with those purposes in mind. That is, were the officer's actions reasonable, or did the officer violate the defendant's Fourth Amendment rights? If the later is true, then appellate courts should exclude evidence secured in violation of the Fourth Amendment.

Appellate courts should continue to provide incentives to the police to get a warrant. The clearly erroneous standard destroys these incentives by making the standard of appellate review the same, whether a warrant is secured or not.

In the case at bar, the appellate court gave deference to a trial court which heard none of the testimony at the evidentiary hearing, which reviewed only the transcript of one of six law enforcement officers, and which reviewed none of the tape recordings of the evidentiary hearing.

Five other officers testified about either the events on the day of the arrest, or police and DEA procedures, as part of the defense's attack upon the reasonable conduct of the police. Interestingly, the trial held that there was reasonable suspicion for the stop. However, the district court neither heard nor read the testimony, nor listened to the recording of the evidentiary hearing of the two officers who were initially at the scene and who ran the NADDIS and motor vehicle checks. The only transcript which

the trial court read was that of Officer Luedke (App. 113). The trial court, therefore, had not reviewed all of the testimony relating to the stop.

Petitioners filed objections to the magistrate judge's recommendations on February 17, 1993, objecting to the findings concerning the initial stop, search of the car, and the stationhouse statements. Luedke did not testify at all about the NADDIS information because he arrived at the seen after the NADDIS check. Similarly, he did not have any information concerning the running of the license plate nor about whether the owner of the car was the same person described in the NADDIS check.

Twenty days later, on March 9, 1993, the trial court issued its decision on the motions to suppress. The balance of the transcripts had not been transcribed and filed until June 6, 1993, almost three months after the trial court's decision. The only transcript available was that ordered by the government of Officer Luedke's testimony. The transcript was prepared on February 4, 1993 and filed February 9, 1993.

The trial court is obligated to conduct a de novo review of those parts of the record for which there are challenges to the magistrate's recommendations. 28 U.S.C. § 636(b)(1)(B). The trial court utterly failed in its obligation to conduct a de novo review. Moreover, the Seventh Circuit failed in its obligation to ensure that such review was performed on remand. There is nothing in the record or the trial court's opinion which even suggests that the trial court reviewed these transcripts after

remand. Yet, the trial court made findings of fact concerning NADDIS, the NADDIS check by the other arresting officer, and the license plate check. Further, the trial court's findings served as the basis for the court's legal conclusions that reasonable suspicion and probable cause to search existed.

In their two appeals to the Seventh Circuit, petitioners urged the Seventh Circuit to review de novo the legal determinations of the trial court. "As this case demonstrates, the district court frequently makes a determination of probable cause in non-warrant cases without having heard a single witness or reviewed the transcripts of the proceedings." (Main brief on post remand appeal, p.4).

Under 28 U.S.C. §636(b)(1) the court may "accept, reject, or modify, in whole or in part, the [magistrate judge's] findings or recommendations." The district court is required to "make a de novo determination of those portions of the [magistrate judge's] report or specified proposed findings or recommendations to which objection is made."

Petitioners stated in their initial main brief at 2:

> Because the district court read only a portion of the transcript generated from the Magistrate Judge's hearing, the trial court's factual determinations shall be reviewed by the "no deference standard." United States v. McConny, 728 F.2d 1195 (9th Cir. 1984)... In this instance the `differing roles' of this appellate court is to review the record de novo to afford proper oversight.

Even the Eighth Circuit, which is solidly in accord with the Seventh Circuit's clearly erroneous standard of review, has

reversed cases where the trial court failed conduct a de novo review when objections were filed. In a post Raddatz case, Taylor v. Farrier, 910 F.2d 518,520 (8th Cir. 1990), the court stated, "In Branch v. Martin, 886 F.2d 1043 (8th Cir. 1989), we remanded a case to the district court because the absence of a transcript or, alternatively, a tape recording, of the evidentiary hearing made de novo review impossible."

Here, the Seventh Circuit reversed and remanded the case initially because the trial court made credibility findings not in accord with his magistrate judge. Once again, the trial court made ultimate legal conclusions without reviewing the transcripts of the testimony of other police witnesses. If the Eighth Circuit reverses for failure of the trial court to review the transcripts, what possible justification is there for the Seventh Circuit to accord the trial court the most deferential standard of review?

Under the clearly erroneous standard for legal conclusions, the exclusionary rule comes into play only where the judge's determination is believed to be clearly wrong. This concept misplaces the focus of the inquiry, upon the judges when it should be on the police conduct. This Court has stated in United States v. Leon, 468 U.S. 897,916 (1984):

> First, the exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates. Second, there exists no evidence suggesting that judges and magistrates are inclined to ignore or subvert the Fourth Amendment or that lawlessness among these actors requires application of the extreme sanction of exclusion.

Petitioners urge this Court to reject the Seventh Circuit's clearly erroneous test, affirm the de novo review standard adhered to by the majority of circuits, and remand the case to the Seventh Circuit.

ARGUMENT II. IT WAS A VIOLATION PETITIONERS' DUE PROCESS RIGHTS FOR THE TRIAL COURT TO REFUSE ACCESS TO THE RAW DATA COMPRISING THE NADDIS CHECK, WHICH WAS LATER USED TO JUSTIFY BOTH THE STOP AND SEARCH.

During pretrial discovery, petitioners requested that the government supply them with the raw data which comprised the NADDIS files on the two individuals who the government asserted were the subject of two NADDIS "hits." While conducting drug surveillance, Detective Pautz requested of the Drug Enforcement Agency (DEA) that a NADDIS check be conducted.

The DEA was given two names. Detective Pautz testified (R.44:34):

> I gave them the name I had received from the license plate listing, which was Miguel Ledesma Ornelas, and I gave them that address that I had received, I think it was San Jose, and I also gave them the name of the person that had registered, which was Ismael Ornelas, and the address that he had put down.

The DEA reported that NADDIS showed a "hit on Miguel Ledesma Ornelas, also known as Lemus-Ledesma, Miguel. Date of birth 9/29/45, 5'6'', 150 pounds, Hispanic male. Listed in their files as being a heroin dealer out of El Centro, California." (R.49:35,105). Pautz relayed this information to Detective Hurrle (R.49:106-107).

The NADDIS showed that "Ismael Ornelas Jr, from Tucson,

Arizona was a one thousand kilo a month cocaine dealer". (R.49:35). "And these were just the names that we received. Not necessarily the people that could have been in the [motel] room." (R.49:35).

In Detective Pautz's experience, the NADDIS response would typically have identifying information, height, weight, date of birth (49:110-111). He testified the extent of such information varied depending on the information in their files.

The errors committed by the officers were numerous. First, because the dispatcher misread the California Department of Motor Vehicles registration, he relayed to Pautz a name, reversing the two last names of the car's owner. The registered owner of the car was not Miguel Ledesma Ornelas, the name in the NADDIS computer, but Miguel Ornelas Ledesma. Detective Hurrle, Pautz's partner, wrote the name down in his offense report as Miguel Ledesma Ornelas of 830 North 16th St., San Jose, California (R.49:102).

Pautz was asked if he understood that persons of Hispanic decent frequently use two family names. He responded, "I know that it was my understanding that they oftentimes use their mother's maiden name. However, I could be wrong on that...I guess I don't have a good understanding of it, is what I am telling you." (R.49:98).

Officer Pagan, of Hispanic decent, who acted as the translator for Saul Ornelas' interrogation, testified that persons of Hispanic decent who use both last names use their father's last name first, and their mother's last name second. This is how the "vast majority" of the people use the last names, although he has

occasionally observed a situation in which the mother's name would be used first (R.50:290).

The resident alien card and California drivers license of Miguel Ornelas-Ledesma, were attached to the affidavit of Ismael Ornelas-Ledesma, which was attached to the Motion to Supplement Brief, filed January 15, 1993 (R.18). That affidavit states that the petitioner's name is Ismael Ornelas Ledesma. §1. His father's last name is Ornelas, and his mother's last name is Ledesma, §1. It further states:

> Neither I nor my siblings would ever be correctly called Ledesma Ornelas, as the government has stated in the Indictment. Someone else might be Ledesma Ornelas, but that person would have a father whose family name is Ledesma and a mother whose last name is Ornelas.
>
> My brother's name is Miguel Ornelas Ledesma...I have never lived in Tucson, Arizona. Nor am I a junior. As stated above, my father's name is Guadalupe, not Ismael.

Before leaving on another assignment, Pautz told Hurrle that the NADDIS response showed that Ismael Ornelas was from Tucson, Arizona (R.49:122-123).

The second error was in not seeking to verify whether the registered owner of the car was the same person as the NADDIS hit. Pautz could have easily inquired as to the date of birth of the owner of the car, to confirm whether the car owner was also the subject of the NADDIS hit, whose DOB was given.

Pautz said he didn't ask his dispatcher to get a DOB from California, "because I didn't think that they could get that

information from California, and I don't know that they could today." (R.49:58).

Sergeant Wiggins, of the Milwaukee County Sheriff's Department is in charge of communications on the second shift. He affirmed that an "integral part of the communications bureau is to provide a link between officers on the street and other information which may be available from other law enforcement agencies via computer or otherwise." (R.50:356).

He testified his office can interface with computers from the departments of motor vehicles of all 50 states, including Canada. "We can get back in a given amount of time any record, motor vehicle record, driving record, registration." (R.50:357).

His office has been able to do this interface with other states' DMV records for a long time, possibly 10 or 15 years, maybe even 20 years (R.50:358). Contrary to Pautz's assertions, he not only was able to get a date of birth for the person who registered the car, but affirmed, "All the officers on the street know about the [regular DMV] system and how it's used, and use it on a regular basis." (R.50:358).

In fact, the government stipulated "that Detective Pautz could have determined the date of birth of Mr. Miguel Ornelas Ledesma by making administrative inquiry, via dispatcher, at the California Department of Motor Vehicles". (R.49:16). Certainly a police detective of nine years and 20 years on the force would know that this identifying information is readily available. His explanation for not doing this cross-check, given the differing residences, is

incredible.

Wiggins was asked to run a check on the California car in question. His initial response gave a name, address and make of car. This was the same information which Pautz had received. (R.50:360, Exhibit F). To receive further identifying information, he had to make a second, "administrative" request via computer. The administrative response showed the registered owner as, "L-e-d-e-s-m-a, Miguel Ornelas. Sex is male. Date of birth of 09/19/63, height of 5'6'', weight of 145 pounds, hair brown, eyes brown." (R.50:362, Exhibit G).

Wiggins was asked to compare this identifying information with a resident alien card and California drivers license supplied to him by the defense. The drivers license name was, "M-i-g-u-e-l, O-r-n-e-l-a-s." The dates of birth were the same. On the resident alien card, "his last name is spelled O-r-n-e-l-a-s, middle name of L-e-d-e-s-m-a, and Miguel, M-i-g-u-e-l." There is a hyphen between Ornelas and Ledesma on the resident alien card. (R.50:363).

On cross examination Pautz said it didn't cause him concern that the person on the NADDIS hit had a completely different address than the person who was the purported owner of the car (R.49:58). He said this, notwithstanding the fact that he had no idea where El Centro or San Jose were, other than he believed that both were in "southern California."

Pautz testified that he didn't think the person who registered at the motel was a "Jr.," as was shown on the NADDIS response. He further stated that he thought the motel registrant listed himself

as being from California, not Tucson, Arizona, as was shown by NADDIS (R.49:60).

When making the NADDIS request, he did not know if he asked for a date of birth for Ismael Ornelas. He did not recall asking for a description of the person. He further did not recall asking for additional information surrounding the alleged cocaine trafficking (R.49:61).

There were no wants or warrants for the car's owner in any state. Similarly, there were no wants or warrants for the person whose name was on the motel register anywhere in the country. (R.49:61). Pautz did not know of any wants or warrants for the two persons listed in the NADDIS response (R.49:61).

In his drug profile factors, Pautz testified that the major source states for cocaine were, "Arizona, California, Florida, Texas, maybe New York. Some of the minor would be maybe New Jersey, Louisiana, a few others...maybe five others." (R.49:62). The magistrate judge took judicial notice that the combined population of those major states according to the 1990 Census was 81,340,130. California had a population of 29,760,021.

Petitioners sought the information which was stored in the DEA's computers, and which constituted the basis for the NADDIS hits. The government refused to provide such information and accordingly, petitioners filed a motion to compel (R.16,11). Petitioners requested the entire file of the DEA concerning the individuals named in the hits. Both the magistrate judge and the trial court refused to compel production (App. C-110) and (App. E-

120). Petitioners argued that the denial of access resulted in an infringement of due process rights.

The initial Seventh Circuit decision did not address the petitioners' due process arguments. On the second appeal, the Seventh Circuit again did not address the argument. In the first appeal, Chief Judge Richard Posner remarked at App.152, "It would be nice to know something about NADDIS, but the government successfully opposed the defendants' efforts to obtain discovery aimed at determining the character and reliability of the information in the NADDIS data base, and as a result the record is bare of evidence about it."

In Alabama v. White, 496 U.S. 325, 110 S.Ct. 2412, 110 L.Ed. 2d 301 (1990), this Court was similarly faced with the question of the worth of an anonymous tip in the context of a Terry stop. This Court stated, 110 S. Ct. at 2416:

> Reasonable suspicion, like probable cause, is dependent upon both the content of the information possessed by the police and its degree of reliability. Both factors-quantity and quality-are considered in the "totality of the circumstances-the whole picture," United States v. Cortez, 449 U.S. 411, 417 101 S.Ct. 690, 695, 66 L.Ed.2d 621 (1981), **that must be taken into account when evaluating whether there is reasonable suspicion." Thus if a tip has a relatively low degree of reliability, more information will be required to establish the requisite quantum of suspicion than would be required if the tip were more reliable. (Emphasis added).**

Both the district court and Seventh Circuit utilized the NADDIS information as a necessary component in its determination that the police had reasonable suspicion to stop petitioners and

probable cause to dismantle the car.

The Seventh Circuit's first decision, (App.151), states, "Clearly, were it not for the NADDIS hits, the officers would not have had grounds for reasonable suspicion that the defendants were drug traffickers." Although the appellate court relied upon the NADDIS hits, it questioned the reliability of such information, "we have found no considered judicial assessment of its reliability, although we have found occasional judicial expressions of concern about that reliability." (App.152-53).

> Maybe NADDIS is no better that a vast compendium of rumors, errors, and libels: garbage in, garbage out. That seems unlikely. It would not be heavily used by drug enforcement authorities if it were merely a random sample of the American population. Which is not to say, however, that it is highly reliable; concern that it may not be is heightened by the (scanty) secondary literature, which depicts NADDIS as an unselective, unweeded repository of unsubstantiated allegations, often dated. See UPI Release, "VIP names in Drug Agency's Computer Files." July 3, 1984; Vanessa Jo Grimm, "Behemoth DEA Database Tracks Drug Smugglers," Government Computer News, July 8, 1991, p.85. According to the UPI Release, as of 1984 NADDIS contained 1.5 million names, obtained from debriefings of informants and suspects and from surveillance and intelligence reports of various law enforcement agencies.
>
> As an example of NADDIS's possible unreliability, we note that according to it Ismael Ornelas, Jr., of Tucson, a 1000 kilogram a month dealer-a large dealer is not wanted by any law enforcement authority in the country. Maybe that Ornelas (who is neither Saul Ornelas nor Ismael Ornelas-Ledesma nor the registered owner of the Olds) died years ago or is some practical joker's or desperate informant's fictional creation or is an honest man falsely accused by an enemy.

The court of appeals continued at (App.153):

> Because the reliability of information stored in NADDIS is unknown, that information must, on the record before us, be reckoned no more reliable than that of an informant not known to be reliable. Therefore, since an

uncorroborated tip from such an informant cannot by itself furnish probable cause for an arrest or search, Illinois v. Gates, 462 U.S. 213, 227, 103 S.Ct. 2317, 2326, 76 L.Ed.2d 527 (1983), an unverified, uncorroborated entry in NADDIS cannot do so either.

The court of appeals determined however:

> Standing alone, the drug courtier profile that first aroused Pautz's suspicions was very little. Standing alone, one NADDIS "hit" could not, in the absence of any evaluation of NADDIS's reliability, be thought much either, The second "hit" however, added to the credibility of the first; and together the profile and the "hits," though still not enough evidence of crime to furnish probable cause to search the car, could satisfy the lesser showing required for a Terry stop. (App.154).

It is petitioners' contention that the NADDIS information which the officers possessed at the time of the stop was not shown to be sufficiently reliable so as to have allowed its use in the determination of reasonable suspicion, as outlined in Alabama v. White, 496 U.S. 325 (1990) and Illinois v. Gates, 462 U.S. 213 (1983).

Under the Gates totality-of-the-circumstances test, "a deficiency in one factor [the informant's veracity or reliability], may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability." 462 U.S. at 233. Even if the NADDIS information was deemed sufficiently reliable to be a part of the Gates formula, there was lacking a "strong showing" in the other components; the drug courier profile, and the somewhat loose panel in a twelve year old car.

When petitioners sought the underlying data comprising the NADDIS information which had been supplied to the officers, they

repeatedly asserted the need to know what information was contained in the NADDIS records, i.e.; the age of the information, and the reliability of the information (R.46:395,398,403). They were looking for concrete facts for a reviewing magistrate to be able to assess the reliability of the information. The government refused to turn over this information claiming that no hard copy of the data was ever generated when the officers requested it, and thus there was nothing to give petitioners (R. 14:3).

The information sought and denied was relevant to a determination whether there was reasonable suspicion to justify the investigative stop and subsequent search. It's relevance can be seen by the decisions of the magistrate judge, the trial court, and the court of appeals, each of which relied upon the NADDIS information to justify the Fourth Amendment incursions.

The NADDIS information might have revealed pertinent facts such as whether these two individuals were dead or in prison, (which is not an unlikely scenario for drug dealers). The information, and the raw files comprising the basis of the NADDIS hit would, in all probability, have had dates necessary to establish whether the information was current, stale and/or unreliable. DEA agent Allen, called as a defense witness, stated, "If there was information or intelligence, many times that has a date behind it." (referring to NADDIS information) (R.46:396).

Identifying information from NADDIS, if it existed, would have conclusively shown that the petitioners were not the NADDIS individuals. Moreover, general intelligence information may well

have been dated. This would have allowed both the police officers and the courts to subsequently evaluate the probative value of the information.

It should be noted that on 12-30-92 Ismael Ornelas asked not only for the NADDIS information on both individuals, but also the "entire" file of the DEA concerning both individuals (R. 11:2, §4 and §5). Petitioners filed a joint objection to the magistrate's ruling. The district court summarily upheld the magistrate's order (Appendix 110-111).

There is no question that the "Miguel," referred to by NADDIS, and Miguel Ornelas, owner of the car, were two separate persons. Their dates of birth were off by 18 years (R.45:362)(R.44:35). Similarly, Ismael Ornelas, by affidavit, in his objections to the magistrate's order concerning discovery, asserted that he never lived in Tucson and that his father's name is Guadalupe, not Ismael. As such, he is not a junior (26:App.109). Clearly, petitioners had made a showing that the information sought was relevant.

The DEA agent was subpoenaed to provide the NADDIS information for the evidentiary hearing. The agent did not bring the material subject of the subpoena. The magistrate judge denied petitioners repeated requests for this information while DEA agent Allen was on the stand (R.51:398,403).

The material was retrievable within minutes, as the DEA office was located on the same floor as the magistrate judge's courtroom. Agent Allen testified that some of this material may reflect the

day on which it was received by NADDIS. The age of the information was crucial in an examination of whether it was stale for Fourth Amendment purposes (R.51:398).

In United States v. Bagley, 473 U.S. 667 (1985), this Court stated that prosecutors must, "disclose evidence that the defense might have used to impeach the Government witnesses...Impeachment evidence, however, as well as exculpatory evidence, falls within the Brady rule. See Giglio v. United States, 405 U.S. 150, 154 (1972)."

In denying petitioners' requested discovery, the magistrate judge merely stated that the petitioners failed to establish that they were entitled to the information under Brady v. Maryland, 373 U.S. 83 (1963), or under Fed.R.Crim.P. 16. (A-120-21). In so doing, there was no discussion or factual or legal analysis.

In responding to the objections that the magistrate judge's ruling, the trial court merely stated the order denying the motion to compel "was not clearly erroneous or contrary to law, and further adopts and incorporates here by reference the reasoning contained in that Order..." (A-111).

Petitioners maintain that the refusal to grant access to the NADDIS raw data precluded the presentation of a defense. Moreover, had they had access to such information, they would have defeated the assertion that the arresting officers had reasonable suspicion to stop and probable cause to search the car. The trial court's refusal to compel constituted an impingement upon fundamental due process rights.

A defendant has the constitutional right to present witnesses to establish a defense. This right has been termed "a fundamental element of due process of law." Taylor v. Illinois, 484 U.S. 400 (1987). Taylor, at 409, instructs, "To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense."

The asserted reason of the government for not providing the NADDIS information was that since the officer received the information verbally from the DEA, there was not a hardcopy of the information to give. This argument did not address whether the requested raw data information sought did, in fact, exist. Petitioners considered this response pretextual and moved to compel.

The magistrate judge ruled:

> In response the government has indicated that neither NADDIS nor the motor vehicle license plate information were ever printed out from the computer and has proffered affidavits in support of this response. Since the materials which the defendants seek do not exist, they obviously cannot be disclosed. (App.120).

The trial court summarily affirmed the magistrate judge, ruling the order "was not clearly erroneous or contrary to law, and further adopts and incorporates here by reference the reasoning contained in that Order..." (App.111). The court of appeals twice did not rule on this due process argument.

Issue No. I. in petitioners' second appeal to the Seventh Circuit states, "Whether the Trial Court's refusal to allow appellants access to the raw data comprising the NADDIS information

deprived appellants of due process rights." Issue No. II. in the original appeal states, "Whether appellants' due process rights were abridged by the trial court's refusal to allow access to the NADDIS information?"

The court of appeals' initial response was, "The other grounds raised by the appellants have too little merit to warrant discussion." (App.157). No response was had in the second appeal.

United States v. Hensley, 469 U.S. 221, 232 (1985) provides that police may stop persons who are the subject of a police broadcast by other police agencies so long as the broadcasting agency can articulate facts establishing reasonable suspicion. Thus, what information the other agency actually possesses is not only relevant but necessary when a defendant later challenges the stop.

Since all reviewing courts relied on the NADDIS information to provide the essential facts to justify the stop and later search, petitioners were entitled to know the basis of the information in the original agency's files. How old was this material? Who supplied the information? Was this person reliable or credible? What is the current status of these persons? How frequently does NADDIS material get purged? Were these dealers engaged in selling drugs in the 1970's, 1980's or 1990's.

We know absolutely nothing about this age or quality of the NADDIS information. We do know that had the dispatcher not reversed the last names of one of these persons, one of the NADDIS "hits" would not exist.

Had the officer made the most basic attempt to corroborate the identity given by NADDIS with the identifying information from the California DMV, he would have known that the DOB's were 18 years apart. His failure to do this basic cross-check resulted in an investigation which was improperly conducted.

As this Court has held in Maryland v. Garrison, 480 U.S. 79,85 (1978), "The validity of the warrant must be assessed on the basis of the information the officers disclosed, or had a duty to discover and disclose, to the issuing magistrate." In Garrison, at 81, the search of the wrong apartment was sustained because the police conducted a reasonable investigation, including "verification of information obtained from a reliable informant, an exterior examination of the three story building...and an inquiry of the utility company."

Here, the police failed to conduct a cross check about information from NADDIS about which he knew nothing; in terms of age, reliability, or quality. A simple check with the California DMV at least would have verified whether the NADDIS Miguel Ornelas was the registered owner of the car. Had he merely done this, he would have learned that they were not the same persons. Further, we do know that at the time of the stop, the officers learned that the other person, Ismael Ornelas was from California, and not Tucson, Arizona. They further learned, prior to the search, that neither petitioners nor the NADDIS individuals were currently "wanted" by police authorities.

The Seventh Circuit relied on the fact that there were two

hits. The second hit tipped the scale in favor of affirming the district court on a clearly erroneous basis. This reliance was, however, misplaced. The first hit was a result of the police's bungling and unreasonable investigation. The second hit, with no identifying data, provided a similar name but differing state of residence, thereby casting doubt on its reliability.

The ultimate Fourth Amendment question is whether the police action was reasonable. The government must comply not only with the Fourth Amendment, but also with the Fifth Amendment's Due Process Clause. The police knew absolutely nothing about the reliability of the NADDIS information, and the government refused to disclose what information it knew.

Pautz was asked whether, if there was "identifying" information, it would necessarily be on the NADDIS computer. The government objected to such inquiry, arguing that Pautz could only testify to what he was told (R.44:111). The magistrate judge correctly responded, "You mean he's using some information he doesn't know how they go about getting it, doesn't know about the reliability of it? Is that what you are telling me about this officer, that he's using information that he doesn't know anything about?" (R. 44:111).

The government responded, "He's told the information. It's my understanding they are not allowed to view the [NADDIS] screen. That they are told the information."

THE COURT: But the point is, Ms. Fleming, doesn't it go to reasonable suspicion? If he doesn't know whether or not it's

reliable or not, doesn't that go to whether or not the officer can have reasonable suspicion?" (R.49:111).

Without NADDIS, neither the stop nor the search were legal. The Seventh Circuit stated, "The fact that a door panel is loose does not by itself create a reasonable likelihood that the panel conceals a secret compartment containing contraband. (Cite omitted). Here as in most cases there was more, but not much more: mainly the NADDIS "hits" of unproven reliability." (App.155-56).

We have come far too close to George Orwell's scenario in 1984 when the government can justify a stop and dismantling of a car on the basis of a drug courier profile, a somewhat loose panel on a twelve year old Oldsmobile, and secret information which the government refuses to disclose, about which we know nothing.

Further, due process is offended when two persons can be sentenced to long prison terms on the basis of secret information from a government computer which fellow law enforcement officers are not allowed to view. If the police officer who requests this information cannot view the screen to independently assess its reliability, and the information is subsequently withheld from defense counsel and the courts how can this information possibly tip the scale to satisfy the "reasonable" requirement of the Fourth Amendment or the Due Process Clause of the Fifth Amendment?

This decision is offensive to the ideals of an open, democratic country. As this Court states in Gates, 462 U.S. at 238, "And the duty of a reviewing court is simply to ensure that the magistrate had a substantial basis for...conclud[ing] that

probable cause existed." If we hold magistrates to that standard when the officer requests a warrant, certainly reviewing courts should hold themselves to at least that standard when the officer acts without prior judicial authority.

We cannot say that the officer possessed a substantial basis for concluding he had probable cause to search the car because we know nothing about the NADDIS information.

If in 1984 there existed 1.5 million names in NADDIS computer, one can only speculate on its current size. If the increase in drug cases handled in federal court in the last eleven years is any indication, the list probably now contains millions of names. Each of these persons is at risk by this decision. Thousands of people whose names are in the NADDIS files may well be "honest m[e]n falsely accused by an enemy," or persons who happen to share similar names. This is precisely the reason why greater scrutiny should be required by this Court, than that which the Seventh Circuit has required.

Conclusion and Prayer for Relief.

Petitioners respectfully submit that this petition for certiorari should be granted and a writ of certiorari issued to review the judgment and opinions of the United States Court of Appeals for the Seventh Circuit and the United States District Court for the Eastern District of Wisconsin.

Respectfully submitted,

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Copy mailed to attorneys for parties by the Court pursuant to Rule 49 (c) Federal Rules of Criminal Procedure.

FILED
U.S. DISTRICT COURT EAST. DIST. WI
SEP 2 0 1994
AT ____ O'CLOCK ____
SOFRON B. NEDILSKY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

Case No. 92-CR-243

SAUL ORNELAS and
ISMAEL ORNELAS-LEDESMA,

Defendants.

DECISION AND ORDER

This matter comes before the Court on remand from the Seventh Circuit for purposes of additional fact-finding and reconsideration of the probable cause issue. The facts of the case, with one addition, are as stated in the initial Magistrate's recommendation dated February 12, 1993, which the Court adopts and incorporates here by this reference.

On February 12, 1993, Magistrate Judge Robert L. Bittner issued a recommendation that defendants' motions to suppress the cocaine at issue be denied. The Magistrate's recommendation was not based on the existence of probable cause. Rather, the Magistrate found that the case fit within the "inevitable discovery" exception to the probable cause requirement. In a decision dated March 9, 1993, this Court upheld the Magistrate's recommendation, but on different grounds. This Court found that the drug courier profile, the two NADDIS hits and the loose door panel, constituted probable cause to remove the door panel and search for drugs. The defendants entered conditional pleas and appealed the suppression issue. The Seventh Circuit vacated the decision on grounds that this Court incorrectly thought the Magistrate had ruled upon the credibility of Officer Luedtke's testimony concerning the loose door panel. The Circuit Court then gave explicit instructions regarding what was to be done on remand:

> The motion to suppress should not have been denied, though it is open to the government on remand to ask the district judge either to hear Luedtke's testimony on the loose panel himself (or at least view the car interior) or refer the matter to the magistrate judge for a determination of the credibility of that testimony. If Luedtke's testimony is disbelieved, the motion to suppress should be granted. If it is believed, the district court must decide whether the loose panel, in conjunction with the NADDIS tips as corroborated by the circumstances that first aroused Officer Pautz's suspicions, adequately established probable cause to believe that drugs were concealed behind the panel.

United States v. Ornelas-Ledesma, 16 F.3d 714, 721-22 (7th Cir. 1994).

On remand, this Court again referred the matter to the Magistrate for purposes of making an initial determination regarding the credibility of Officer Luedtke's testimony and the existence of probable cause. The Magistrate found Officer Luedtke's testimony regarding the loose door panel credible, and this Court accepts that finding. The Magistrate further found, however, that adding the loose door panel to the drug courier profile and the two NADDIS hits was not sufficient to establish probable cause. This is contrary to the Court's original conclusion, which

found that "reasonable suspicion became probable cause when Officer Luedtke found that the right rear door panel of the car was loose."

The Court acknowledges that the issue is a close one, but weighing the evidence "not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement," see Texas v. Brown, 460 U.S. 730, 742 (1983), the Court is compelled to reach the same conclusion. Both the Seventh Circuit and the Magistrate raised concerns regarding the broad brush of drug courier profiles, the reliability of the NADDIS system, and the significance of a loose door panel in a 12-year old car from General Motors. Viewed individually, these facts may be unremarkable. They become more meaningful when, in a specific case, they converge and form around two specific individuals. That is what happened here. The question is whether, based on that confluence of facts, Officer Luedtke was reasonable and justified in his belief that drugs lay within the defendants' car door. In answering this question, the law says that Officer Luedtke and his actions are not to be judged in hindsight. This means that his search is not justified by the fact that he was right. It also means that his search is not invalid simply because the names on the two NADDIS hits were not absolutely identical to the names provided, or because the addresses did not match up, or because the other information he relied upon was relatively innocuous when considered alone. The test is one of flexibility and common sense, requiring only "practical, nontechnical probabilit[ies]". Id.

This case strikes the Court as an example of how common sense translates into good and constitutionally valid police work. As the Seventh Circuit noted, "Milwaukee police keep a regular watch on motels, looking for drug runners." Ornelas-Ledesma, 16 F.3d at 715. This makes sense, and this is what the officers were doing here when they discovered defendants' older model, two-door GM car with source state license plates. A routine survey thus became a hunch. An examination of the motel registry showed that the car was driven by two men who checked into the motel at 4:00 a.m. without advance reservations. The hunch thus grew stronger.[1] Then a NADDIS check on the registered owner of the vehicle scored a hit on a known or suspected heroin dealer, although the addresses did not match up. The hunch ripened into generalized suspicion. A NADDIS check on the name listed in the motel registry also scored a hit on a prolific cocaine dealer, although the addresses again did not match up and there was a "Jr." designation appended to the name retrieved by NADDIS. Nonetheless, two NADDIS hits on names virtually identical to those uncovered by the officers were too impressive to be coincidental. Generalized suspicion thus became reasonable suspicion directed at two specific individuals. After the resulting Terry-stop, one of the suspects produced identification containing the name of the NADDIS cocaine dealer. Suspicions were confirmed and reinforced. Officer Luedtke asked for permission to search the vehicle. Consent was given. During a general search of the interior, Officer Luedtke discovered a loose door panel near the right rear seat.

What was Officer Luedtke to do? At this juncture, every additional step turned up additional information which dispelled doubt about the innocent nature of the facts and made the officers' suspicions stronger and more probable. Should Officer Luedtke have stopped at that point simply because a loose door panel on a 12-year old car, considered by itself, is likely to be a common occurrence? Or, does

[1]While the Seventh Circuit recognized these facts as "innocent taken by [themselves]," Ornelas-Ledesma, 16 F.3d at 716, they do not preclude the officers from developing their intuition.

Officer Luedtke view the loose panel as the accumulated evidence directs him to view it, as his experience has told him to view it, and as a number of cases have also viewed it; "[A]s a telltale sign of drug running"? Id. at 720.[2] A competent police officer removes the door panel. He removes it because it is the final fact in a string of unbroken facts which establishes the probable cause equation.

NOW THEREFORE, BASED ON THE FOREGOING, IT IS HEREBY ORDERED THAT:

1. The Government's objection to the Magistrate's recommendation is sustained and the defendants' motions to suppress are denied.

Dated at Milwaukee, Wisconsin, this 26th day of September, 1994.

SO ORDERED,

HON. RUDOLPH T. RANDA
U. S. District Judge

[2]See Magistrate's Recommendation dated February 12, 1993 at 6-7 ("Based upon his training, Luedtke suspected the panel had been removed and contraband was hidden inside)

AO 72A

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P... t
to ... of
Criminal Procedure.

U.S. DIST. COURT EASTERN DIST. WI
FILED
MAR 29 1994
AT 9:35 O'CLOCK M
SOFRON B. NEDILSKY

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

ISMAEL ORNELAS-LEDESMA and SAUL ORNELAS,

Defendants.

Case No. 92-Cr-243

MAGISTRATE JUDGE'S POST-REMAND RECOMMENDATION TO THE HONORABLE RUDOLPH T. RANDA RE: DEFENDANTS' MOTIONS TO SUPPRESS

NATURE OF CASE

On February 12, 1993 this Court issued a recommendation on motions to suppress physical evidence filed by defendants Saul Ornelas and Ismael Ornelas-Ledesma. In addressing the defendants' motions to suppress, this Court concluded the defendants were lawfully subjected to an investigatory detention based upon reasonable suspicion and clearly consented to a search of the 1981 Oldsmobile. However, this Court further concluded that, under governing case law, the consent did not extend to the door panels and a search of those door panels was not supported by requisite probable cause, because the testimony of Milwaukee County Deputy Sheriff Lyle Luedke, regarding the presence of rust in the groove of the Phillips screw used to attach the vent cover to the door, was not credible. Nonetheless, this Court recommended denial of the defendants' motions to suppress evidence,

since the seizure of cocaine fell within the inevitable discovery exception to the Fourth Amendment exclusionary rule of Nix v. Williams, 467 U.S. 431, 433 (1984).

Subsequently, in a March 9, 1993 order, United States District Judge Rudolph T. Randa considered the defendants' objections to the recommendation and ruled the holding regarding inevitable discovery was unnecessary, because the facts found by this Court established probable cause to remove the door panel vent cover and search the compartment behind it. Thereafter, Judge Randa accepted conditional pleas of guilty, pursuant to Fed. R. Crim. 11(a)(2), from the defendants who then appealed the adverse suppression decision.

The Court of Appeals for the Seventh Circuit issued a decision in the matter on February 10, 1994 vacating the defendants' judgments of conviction and remanding the case for further proceedings consistent with its opinion which holds:

> The motion to suppress should not have been denied, though it is open to the government on remand to ask the district judge either to hear Luedke's testimony on the loose panel himself (or at least view the car's interior) or refer the matter to the magistrate judge for a determination of the credibility of that testimony. If Luedke's testimony is disbelieved, the motion to suppress should be granted. If it is believed, the district court must decide whether the loose panel, in conjunction with the NADDIS tips as corroborated by the circumstances that first aroused Officer Pautz's suspicions, adequately established probable cause to believe that drugs were concealed behind the panel. The court may wish to consider the evidence of the loose panel (if that evidence is believed) in conjunction with the Philips screw.

United States v. Ornelas-Ledesma, et al, Nos. 93-2356, 93-2405 (slip op. at 15) (7th Cir. Feb. 10, 1994). On March 15, 1994 Judge Randa,

in turn, referred the matter to this Court for further proceedings in accord with the directions of the Court of Appeals.

DISCUSSION AND ANALYSIS

In its recommendation, this Court made the following findings of fact:

> When Hurrle announced he had completed the search of the trunk, with negative results, Luedke proceeded to the passenger area of the vehicle and checked to see whether the back seat was loose. Upon finding it was not, he examined the right rear quarter panel near the handle. He found this panel to be loose. Based upon his training, Luedke suspected the panel had been removed and contraband was hidden inside. Luedke testified he then observed the vent area of the door, noticing the presence of rust in the groove of the Phillips screw used to attach the vent cover, which led him to believe the vent cover had recently been removed. Luedke then released the screw, dismantled the vent area of the door, and exposed a cavity approximately five (5) inches high and four (4) inches wide which contained a paper bag in which he felt a hard block.

(Emphasis added.) (February 12, 1993 Recommendation at 6.)

Officer Luedke's testimony as to the screw was found by this Court to be incredible, in light of the undisputable condition of the screw itself. Nonetheless, except for the rule of Falsus In Uno Falsus In Omnibus, I have no reason not to believe the panel was loose. Thus, I accept as credible Luedke's testimony that the panel was loose. However, the loose panel alone, given the age of the Oldsmobile, is not probative evidence of the fact it necessarily had been recently removed. See United States v. Ornelas-Ledesma, et al, Nos. 93-2356, 93-2405, slip op. at 13 (observing the interior of a

1981 Oldsmobile, unlike that of a Rolls Royce, is apt to be rather worn and battered after eleven [11] years).

So what else is there besides the loose panel to establish probable cause that the compartment had recently been opened and contained contraband. Answer: Only the two (2) NADDIS "hits" and the questionable "drug courier" profile consisting of the facts the defendants were Hispanic Californians driving a two-door General Motors car who had checked into a motel very early in the morning, traveled as a pair rather than alone, and had not made advance reservations. See United States v. Ornelas-Ledesma, et al, Nos. 93-2356, 93-2405, slip op. at 5 ("confluence of the circumstances is pretty innocuous . . . especially since many of the circumstances are correlated rather than independent"). The NADDIS computer reports showed a "hit" on Miguel Ledesma Ornelas, also known as Miguel Lemus-Ledesma, identified by NADDIS as a heroin dealer in El Centro, California, which is hundreds of miles from San Jose, the residence of the registered owner of the car; and a second "hit" on Ismael Ornelas, Jr., of Tucson, Arizona who was reported to be a 1,000 kilogram per month cocaine dealer, although no "wants" or warrants were outstanding against him. Thus, the NADDIS reports are so convoluted and mismatched that they are of little probative value in the probable cause determination. Consequently, the only evidence in the probable cause calculus is the loose panel, a weak drug courier profile, and inconclusive NADDIS "hits." There is just not enough evidence for a reasonable law enforcement officer to believe the door compartment contained contraband, as opposed to being a mere

sign of an aging General Motors automobile. See State v. Swanson, 838 P.2d 1340, 1345-48 [Ariz. App. 1992]) (no probable cause to believe evidence of crime would be found in the space behind door panels; the screws of which appeared to have been tampered with and were loose, where only other facts were defendant became nervous when the officer opened the vehicle door, and supposed "drug courier profile" consisted of facts that defendant and his passenger were traveling east on an interstate highway in a rental car with electronic paging equipment and a cellular phone). Missing are any additional indicia requisite to a finding of probable cause, as noted in the following cases. See United States v. Lugo, 978 F.2d 631, 637 (10th Cir. 1992) (suggesting probable cause to search behind door panels may have existed because totality of circumstances suggested the hidden space contained contraband: defendant was armed, traveling interstate, did not have luggage or other articles normally associated with such a trip; displayed noticeable interest in locking his truck after being told by officers not to; had a weapon within easy reach along with a fully loaded clip, and additional ammunition on the floor of the trunk; and there was a loosened door panel with a creased edge indicating someone had accessed the cavity inside); United States v. Pena, 961 F.2d 333, 339 (2nd Cir. 1992) (defendant entitled to evidentiary hearing on whether probable cause existed for search of door panel where facts in addition to those furnishing reasonable suspicion for investigatory detention were "asserted discovery of an empty bag and screwdriver in the back seat of detained automobile"); United States v. Arango, 912 F.2d 441, 447

(10th Cir. 1990), cert. denied, 499 U.S. 924 (1991) (probable cause for arrest where officers noticed truck bed did not seem right because it was very shallow, after lifting the tailgate corner of a rubber mat covering truck bed, observed that truck bed had apparently been modified; their knocks on truck bed suggested hidden compartment was running beneath the bed; and defendant had inadequate amount of luggage for purported two [2] week vacation); United States v. Garcia, 897 F.2d. 1413, 1419 (7th Cir. 1990) (upholding search of door panels when, while conducting consensual visual search, officers noted lack of window cranks and door handles mismatched and ill fitting screws on the door panels, and spotted packages inside the door while looking through the window opening); United States v. Thomas, 787 F.Supp. 663, 684 (E.D. Tex. 1992), aff'd without op., 983 F.2d 1062 (5th Cir. 1993) (probable cause to open exterior side panels of vehicle based on drug sniffing dog's strong alert); Munguia v. State, 737 S.W.2d 658, 660 (Ark. App. 1987) (marijuana residue on car floor boards and loose fitting door panel warranted reasonable belief additional marijuana would be found in door panel).

In its opinion, the Court of Appeals also suggested the Court might wish to consider the evidence of the loose panel in conjunction with the Phillips screw which, upon examination by the Appellate Court, "looked as if it had been scratched in just the way one would expect if it had been removed and reinserted", though also noting its appearance could "reflect its removal by Officer Luedke or other handling since." United States v. Ornelas-Ledesma, et al, Nos. 93-2356, 93-2405, slip op. at 15. However, the parties orally

stipulated to resolution of the matter based upon the prior record.

Review of that record discloses Luedke "used a small pocket-type knife to remove the Phillips screw from the plastic vent cover" (Tr. 156). Luedke further testified "a closer examination of that screw indicated there was rust in the area of the Phillips head of the screw" (Tr. 155-156). When the screw was brought to this Court for examination, it was contained in a film canister which was fitted with cotton (Tr. 423). The record regarding the condition of the screw and the source of any scratches on it which the Court of Appeals observed is inconclusive. Based on the parties' stipulation, this Court has not reexamined the screw and the record is insufficient for this Court to make a determination of when or how the screw was scratched. Consequently, any scratches on the screw have no impact on this Court's determination that there was not probable cause for the search of the door panel.

It may be that, based upon this Court's recommended disposition of the defendants' motions to suppress, Judge Randa may decide the record regarding the scratches on the screw requires further development. However, due to the fact the defendants, whose appearance would be requisite at a supplemental evidentiary hearing, pursuant to Fed. R. Crim. P. 43(a), are confined in California, necessitating two (2) to three (3) weeks advance notice of an evidentiary hearing in this District so they could be transported here by the United States Marshal, it is impossible for me to conduct such a hearing by reason of my March 31, 1994 retirement from the bench.

In sum, this Court finds testimony of Officer Luedke regarding the loose panel is credible, but that testimony combined with the other factors which contributed to reasonable suspicion to stop the defendants, did not establish probable cause to search the door panel.[1] The record regarding the scratches on the screw is inconclusive and does not contribute to this Court's probable cause calculus. Consequently, this Court will recommend that the defendants' motions to suppress physical evidence be granted.

CONCLUSION

NOW THEREFORE, IT IS HEREBY RECOMMENDED that the United States District Judge enter an order **GRANTING** defendant Saul Ornelas' motion to suppress and exclude physical evidence; and,

IT IS FURTHER RECOMMENDED that the United States District Judge enter an order **GRANTING** that aspect of defendant Ismael Ornelas-Ledesma's motion to suppress items seized from the 1981 Oldsmobile.

Your attention is directed to 28 U.S.C. § 636(b)(1)(B) and (C) and Local Rule 13.03 (E.D. Wis.), whereby written objections to the foregoing recommendation may be filed in duplicate with the Clerk

of Court within ten (10) days hereof. Failure to file a timely objection shall result in a waiver to your right to appeal.

Dated at Milwaukee, Wisconsin this 29th day of March, 1994.

Robert L. Bittner

ROBERT L. BITTNER
United States Magistrate Judge

AO 72A

1. In its February 12, 1993 recommendation, this Court also found there was not probable cause for a search of the door panel. However, it recommended the defendant's motions to suppress be denied, based upon its finding that discovery of the cocaine in the door panel fell within the inevitable discovery exception to the exclusionary rule. This finding was not defended on appeal by the government and, consequently, has been waived. United States v. Ornelas-Ledesma, et al, Nos. 93-2356, 93-2405, slip op. at 15.

Copy mailed to attorneys for parties by the Court pursuant to Rule 49 (c) Federal Rules of Criminal Procedure.

FILED
U.S. DISTRICT COURT EAST. DIST. WISC.
FEB - 9 1993
AT ____ O'CLOCK ____ M
SOFRON B. NEDILSKY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

-vs-

Case No. 92-CR-243

SAUL ORNELAS and
ISMEAL LEDESMA ORNELAS,

Defendants.

ORDER

This matter comes before the Court on a joint appeal filed by the defendants, Saul Ornelas and Ismeal Ledesma Ornelas ("Defendants"), to an Order issued by Magistrate Judge Robert L. Bittner denying Defendants' Motions to Compel Discovery seeking printout copies of computer information received by a Milwaukee County Sheriff's detective through the NADDIS System and through a system that can track the owner of a vehicle by reference to the vehicle's license plate. Magistrate Judge Bittner's Order was issued on January 15, 1993, and the joint appeal was filed on January 20, 1993. The Defendants also requested that the evidentiary hearing regarding the validity of the Terry stop and investigation, scheduled for 10:00 a.m. on January 21, 1993, be stayed in the event the Court was unable to review the appeal prior to the hearing.

The Court was able to fully review the Defendants' joint appeal prior to the Terry hearing, and verbally communicated to Magistrate Judge Bittner's Chambers prior to the hearing the Court's decision to affirm his decision and deny the appeal. This Order merely memorializes that decision. Therefore, pursuant to 28 U.S.C. § 636(b)(1)(A) and Local Rule 13.02, the Court hereby finds that Magistrate Judge Bittner's Order denying the motions to compel was not clearly erroneous or contrary to law, and further adopts and incorporates here by reference the reasoning contained in that Order as the basis for the Court's decision to deny Defendants' joint appeal.

NOW THEREFORE, IT IS HEREBY ORDERED THAT:

1. Defendants' Motion to Stay Evidentiary Hearing is denied; and

2. Defendants' joint appeal of Magistrate Judge Bittner's January 15, 1993 Pretrial Order denying Defendants' Motions to Compel Discovery is denied.

Dated at Milwaukee, Wisconsin, this 9th day of February, 1993.

SO ORDERED,

HON. RUDOLPH T. RANDA
U. S. District Judge

Copy mailed to attorneys for parties by the Court pursuant to Rule 49 (c) Federal Rules of Criminal Procedure.

FILED
U.S. DISTRICT COURT EAST. DIST. WISC
MAR - 9 1993
AT ____ O'CLOCK ____ M.
SOFRON B. NEDILSKY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

-vs- **Case No. 92-CR-243**

ISMEAL ORNELAS LEDESMA and SAUL ORNELAS,

Defendants.

DECISION AND ORDER

This matter comes before the Court on objections filed by the defendants, Ismeal Ornelas Ledesma ("Ismeal") and Saul Ornelas ("Saul"), to the Recommendations issued by Magistrate Judge Robert L. Bittner denying defendants' motions to suppress certain statements and physical evidence. For the following reasons, defendants' objections are overruled and the Magistrate's Recommendation is affirmed, although the Recommendation as to the suppression of physical evidence is affirmed on grounds somewhat different than those expressed by Magistrate Bittner.

Magistrate Bittner's Recommendation thoroughly explains the nature of the case and his corresponding findings of fact, which the Court incorporates here by this reference. In the interests of brevity, and having read the parties'

initial briefs before the Magistrate and subsequent written objections, the Court summarily affirms the Magistrate's recommendations regarding (1) the finding of reasonable suspicion for a *Terry*-stop; (2) the finding of consent for the vehicle search; and (3) the denial of both defendants' motions to suppress their post-arrest statements. With respect to the foregoing issues the Court simply adopts the reasoning contained in Magistrate Bittner's Recommendation, along with the factual findings he relied upon in reaching those conclusions.[1] Thus, the only question remaining is whether the cocaine seized from the defendants' vehicle must be suppressed as the result of an invalid search.

I. SUPPRESSION OF PHYSICAL EVIDENCE.

Magistrate Bittner found that removing the door panel to find the cocaine at issue was a search that went outside the scope of the defendants' initial consent to search the vehicle, and further that the search could not be justified on grounds of probable cause. (Magistrate Recommendation at 15.) The

[1] With one exception (the question whether Officer Luedke's gun was visible as he approached the defendants' vehicle -- the parties agree that it was not), none of the parties attack the basic accuracy of the facts as found by Magistrate Bittner, although both defendants dispute the legal conclusions reached by the Magistrate based on those facts. For example, defendant Ismeal points to several facts which he feels are important to the issues but which the Magistrate did not address, and also disputes the Magistrate's characterizations of some of the underlying testimony and evidence. (Ismeal's Objection at 2-10.) Defendant Saul does the same, particularly with respect to the decision on the motion to suppress his post-arrest statements (Saul Objection at 4-5), and then simply incorporates the arguments and facts contained in his initial briefing, which are essentially the same facts and characterizations of testimony stressed by Ismeal in his objection. (Saul Objection at 2.) The Court has taken into consideration the additional facts and differing characterizations raised by the defendants in these documents and finds that, even if true, they do not affect the Court's decision to affirm Magistrate Bittner's Recommendation on the three issues referenced above. The Court therefore adopts the Magistrate's factual findings as its own, with the exception of his finding that Officer Luedke's gun was "visible but not drawn" as he approached the defendants' vehicle. (Magistrate Recommendation at 5-6.) The Court, having read the objections of record and the transcript of Officer Luedke's testimony, hereby finds that Officer Luedke's gun was not visible as he approached the defendants' vehicle.

Magistrate nonetheless denied the motions to suppress on grounds of inevitable discovery, finding that the police had a sniffer dog present at the scene which would have been used by the officers to find the cocaine if their own search proved unsuccessful. (Id. at 16.) The Court does not reject the Magistrate's holding regarding inevitable discovery[2], but finds that holding unnecessary in view of the Court's belief that the facts found by Magistrate Bittner establish probable cause to remove the door panel at issue and search the compartment behind it.

The United States Supreme Court has cautioned lower courts not to become too technical or mechanical in their probable cause determinations:

> As the Court frequently has remarked, probable cause is a flexible, common-sense standard. It merely requires that the facts available to the officer would "warrant a man of reasonable caution in the belief". . . that certain items may be contraband or stolen property or useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false. A "practical, nontechnical" probability that incriminating evidence is involved is all that is required. . . . "The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about

[2] Under the doctrine of inevitable discovery, evidence obtained by unlawful means will not be excluded if the prosecution can establish, by a preponderance of the evidence, that the same information inevitably would have been discovered by alternate lawful means which the police were actively pursuing prior to the misconduct. See generally, Nix v. Williams, 467 U.S. 431 (1984). Here, the Magistrate found, and this Court concurs, that the officers had summoned a sniffer dog and dog handler to the scene prior to the search, and that the officers would have used the dog if the search had not proved successful. (Magistrate Recommendation at 16-17.) The Magistrate also found that a canine sniff would have found the cocaine at issue. (Id.) The defendants now object to this latter finding, arguing that there was no evidence submitted during the suppression hearing regarding the reliability of canine sniffs in general, or of sniffs by this dog in particular. (Saul's Objection at 2-3; Ismeal's Objection at 15-16.) The Magistrate apparently did not consider this question, perhaps because neither defendant raised the issue in their post-hearing briefs, or perhaps because both defendants' briefs seemed to admit the same by stating that "[d]ogs have been trained to sniff the exterior of cars and do react or alert to cocaine hidden in car bodies and in trunks." (See Saul's Brief at 19; Ismeal's Brief at 25-26.)

> human behavior; jurors as factfinders are permitted to do the same -- and so are law enforcement officers. Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement."

Texas v. Brown, 460 U.S. 730, 742 (1983). (Citations omitted.)

The Seventh Circuit requires the same flexibility. "Probable cause exists if the facts and circumstances within [the officers'] knowledge and of which they had reasonable trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an item subject to seizure will be found in the place to be searched." United States v. Garza-Hernandez, 623 F.2d 496, 499 (7th Cir. 1980). "Probable cause is thus more than bare suspicion, but less than virtual certainty." Id. "As the term itself implies, probable cause exists if the probability is that the thing sought is in the place to be searched; probabilities are to be assessed in the light of practical experience and the practical inferences to be drawn from known or reliable facts." Id. "Government agents are entitled to reasonably rely on their special knowledge and expertise in assessing probabilities and drawing inferences." Id.

In cases involving a vehicle search, "[p]robable cause . . . exists when the facts and circumstances would lead a reasonably prudent person to believe that the vehicle contains contraband." United States v. Strickland, 902 F.2d 937, 942 (11th Cir. 1990). "The facts and circumstances upon which a finding of probable cause is based include "the sum total . . . and the synthesis of what the police have heard, what they know, and what they observe as trained officers." Id., at 942-43. Moreover, in cases involving a *Terry*-stop based upon reasonable

suspicion, information gathered after the stop may be added to information gathered before the stop for purposes of determining whether there is probable cause, and as such the reasonable suspicion relied upon in making the stop may ripen into probable cause to search. See generally, United States v. Van Lewis, 409 F. Supp. 535, 542 (E.D. Mich. 1976); United States v. Avalos-Ochoa, 557 F.2d 1299, 1303 (9th Cir. 1977).

The Magistrate's decision on the probable cause issue focused upon the accuracy of one fact, i.e., whether Officer Luedke was correct in his belief that a screw attaching the air vent to the door panel was rusted, giving rise to his belief that the panel had been recently removed. After the screw was produced and the parties stipulated to the fact that it was not rusted, the Magistrate ruled that there was no probable cause to search because "[t]he record disclose[d] no evidence from which Luedke could conclude that a hidden panel contained contraband." (Magistrate Recommendation at 15.)

The Magistrate's ruling would appear to run contrary to his own factual findings, and in any event does not consider the totality of the circumstances leading up to the removal and search of the door panel. The defendants and their car were singled out during a routine survey of motels conducted for the express purpose of looking for drug trafficking activity. (Magistrate Recommendation at 3.) The vehicle involved was a 1981 two (2) door Oldsmobile, an older GM model which is often used by drug traffickers to conceal contraband. (Id.) The car had California license plates, and its owner was listed as residing in California, a source state for controlled substances. (Id.) There were two individuals travelling together in the car, and they had checked into the motel

at four o'clock in the morning, without reservations. (Id.) By itself this "drug courier profile", as the defendants call it, may not constitute reasonable suspicion or probable cause. But then two NADDIS checks were run on the names of the car owner and the individual listed in the motel's registry, and both names turned up hits on known drug dealers.[3] (Id. at 4.) These hits, combined with the drug courier profile, clearly gave rise to a reasonable suspicion that drug trafficking activity was afoot and that the vehicle contained contraband of some kind. This reasonable suspicion became probable cause when Officer Luedke found that the right rear door panel of the car was loose, leading him to suspect that the panel had been removed and that contraband was hidden inside. (Id. at 6-7; Transcript of Off. Luedke's Testimony at 15-16.)

Thus, considering the totality of the circumstances, including the drug courier profile, the two NADDIS hits, and the loose door panel, this Court finds that an officer of reasonable caution would be justified in the belief that

[3] Much has been made of the fact that there appeared to be some minor discrepancies between the names and addresses of the individuals who turned up on the NADDIS check, and the names which the officers had actually obtained during their investigation. For instance, the name on the motel registry was "Ismeal Ornelas", and Ismeal's drivers license, which he produced prior to the search, indicated that he lived in California. The NADDIS hit, however, was for an individual named "Ismeal Ornelas, Jr.", who was listed as being a resident of Arizona. Similarly, defendants allege that the proper Hispanic translation of the name given to the officer as the owner of the vehicle was Miguel Ornelas-Ledesma, whose residence was listed as San Jose, California. The NADDIS hit was for a Miguel Ledesma-Ornelas, whose residence was listed as El Centro, California. Focusing on these discrepancies as a basis for defeating probable cause introduces requirements of certainty and absolute correctness into the analysis that were expressly proscribed by the Supreme Court in Texas v. Brown. It also ignores the fact that drug traffickers may be highly mobile, that the names at issue are virtually identical, that the names are associated with individuals fitting a drug courier profile, and that the names are further associated with a vehicle containing a loose door panel.

contraband would be found behind the right rear door panel.[4] This conclusion is further supported by decisions from the Seventh Circuit finding that the amount of probable cause necessary for the police to do something, such as conduct a search, "depends on how deeply they invade the zone of privacy", United States v. Concepcion, 942 F.2d 1170, 1173 (7th Cir. 1991), and that "the reasonable expectation of privacy that persons may have in their autos is usually of a lesser magnitude than privacy expectations that inhere in other types of property." Garza-Hernandez, 623 F.2d at 500. Given this lower expectation of privacy, and the confluence of the above facts and circumstances, the officers clearly had probable cause to remove the door panel.[5]

[4] The fact that the screw holding the air vent to the door panel was not rusted, as Officer Luedke had testified, does not destroy probable cause. According to his own testimony, Luedke already had reason to believe the panel had been removed, and contraband hidden inside, by virtue of the fact that the panel was loose. (Luedke Transcript at 15-16; Magistrate Recommendation at 6-7.)

[5] Of course, the above analysis only resolves the probable cause issue, which is only half of the analysis under the Fourth Amendment. Even with probable cause, officers must first obtain a warrant to search, unless the circumstances fall within one of the exceptions to the warrant requirement. Here, the exception is obvious, i.e., the "automobile exception". The "automobile exception" allows the warrantless search of a vehicle where probable cause exists to believe that the vehicle contains contraband or evidence of criminal activity. United States v. McGuire, 957 F.2d 310, 314 (7th Cir. 1992). The exception is justified by the vehicle's ready mobility and the lesser expectation of privacy people have in their automobiles. United States v. Galiman, 907 F.2d 639, 641 (7th Cir. 1990).

NOW THEREFORE, BASED ON THE FOREGOING, IT IS HEREBY ORDERED THAT:

1. The defendants' objections to the Magistrate's Recommendation are overruled, and the defendants' motions to suppress certain post-arrest statements and physical evidence are denied; and

2. No objection being taken to the Magistrate's Order granting Defendant Saul Ornelas' motion for severance[6], the same is affirmed.

Dated at Milwaukee, Wisconsin, this 9th day of March, 1993.

SO ORDERED,

HON. RUDOLPH T. RANDA
U. S. District Judge

[6] As Defendant Saul Ornelas correctly points out, the Magistrate's Order contains a typographical error on the last page, which states that the defendant's motion for severance was "denied" rather than "granted". The analysis contained on the page preceding the typo makes it clear that Magistrate Bittner was granting the motion, not denying it, and that the statement on the following page was in error.

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4:20 P.M.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

JAN 15 1993

UNITED STATES OF AMERICA,

Plaintiff,

v.

SAUL ORNELAS and
ISMEAL LEDESMA ORNELAS,

Defendants.

Case No. 92-Cr-243

MEMORANDUM AND ORDER RE: DEFENDANTS' MOTIONS TO COMPEL DISCOVERY

MEMORANDUM

Defendants Saul Ornelas and Ismeal Ledesma Ornelas move the Court for issuance of orders compelling the government to disclose printout copies of information received by Milwaukee County Sheriff's Department Detective Michael Pautz on December 11, 1992 through the Narcotics and Dangerous Information Systems (hereinafter referred to as NADDIS) concerning Miguel Ledesma Ornelas, as well as information he received regarding the owner of a 1981 Oldsmobile bearing State of California license plate #CA 2YOY835 which Detective Pautz had stopped. Defendant Saul Ornelas also seeks disclosure of the "raw data" used to create the NADDIS entry. In response the government has indicated that neither NADDIS nor the motor vehicle license plate information were ever printed out from the computer and has proffered affidavits in support of this response. Since the materials which the defendants seek do not exist, they obviously cannot be disclosed. Thus, the defendant's request for printouts will be denied.

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Furthermore, as to defendant Saul Ornelas' request for the government files used to create the NADDIS information on Miguel Ledesma Ornelas, he has failed to establish it is exculpatory information to which he is entitled under Brady v. Maryland, 373 U.S. 83 (1963) or that it is discoverable under Fed. R. Crim. P. 16. Accordingly, the motions to compel discovery of defendants Saul Ornelas and Ismeal Ledesma Ornelas will be denied.

ORDER

NOW THEREFORE, IT IS ORDERED that defendant Saul Ornelas' motion to compel discovery be and hereby is **DENIED**; and,

IT IS FURTHER ORDERED that defendant Ismeal Ledesma Ornelas' motion to compel discovery be and hereby is **DENIED**.

Your attention is directed to 28 U.S.C. § 636(b)(1)(A) and Local Rule 13.02 (E.D. Wis.), whereby written appeal from any order herein or part thereof may be filed within ten (10) days hereof.

Dated at Milwaukee, Wisconsin this 15th day of January, 1993.

BY THE COURT:

Robert L. Bittner

ROBERT L. BITTNER
United States Magistrate Judge

Copy entered as statement for record of court pursuant to Rule 32(c) Federal Rules of Criminal Procedure.

5:00 FILED P.M.
CLERK U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

FEB 12 1993

UNITED STATES OF AMERICA,

Plaintiff,

v.

SAUL ORNELAS and
ISMEAL LEDESMA ORNELAS,

Defendants.

Case No. 92-Cr-243

MAGISTRATE JUDGE'S RECOMMENDATION TO THE HONORABLE RUDOLPH T. RANDA AND ORDER

NATURE OF THE CASE

On December 15, 1992 a federal grand jury sitting in this District returned a one (1) count indictment against defendants Saul Ornelas (hereinafter referred to as Saul) and Ismeal Ledesma Ornelas (hereinafter referred to as Ismeal), charging them with violating 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2 by knowingly and intentionally possessing, with intent to distribute, a mixture containing cocaine.

The defendants appeared before this Court on December 17, 1992 for arraignment, entering pleas of not guilty. Pursuant to the pretrial scheduling order, the defendants filed various pretrial motions which are ready for resolution and will be addressed herein. Previously, the defendants' motions to compel discovery were denied by this Court's order of January 15, 1993, which was upheld on appeal by Judge Randa.

MOTIONS TO SUPPRESS

Defendants Saul and Ismeal move the Court for issuance of orders suppressing evidence seized on December 11, 1992 from their persons and a 1981 Oldsmobile bearing State of California license plate number 2YOY835, which was parked in front of room 4 of the Suburban Motel, 4600 South 27th Street, Milwaukee, Wisconsin. They contend their Fourth Amendment rights to be free from unreasonable searches and seizures were violated when law enforcement officers subjected them to an investigatory stop, without "reasonable suspicion"; searched the Oldsmobile without their consent and, without probable cause, conducted an intrusive search of the interior of the vehicle's right rear door by removing a plastic vent cover. Both defendants also seek suppression of statements obtained from them while they were in custody at the City of Milwaukee Police Department (hereinafter referred to as MPD) on the grounds such statements were obtained in violation of their Miranda rights and were involuntary.

These motions were the subject of an evidentiary hearing conducted by the Court on January 21, 22, and 25, 1993. At the hearing Milwaukee County Deputy Sheriffs (hereinafter referred to as MCDS) Michael Pautz, Lyle Luedke, Gil Pagan, Donald Hurrle, Roger R. Wiggins, and United States Department of Justice, Drug Enforcement Administration (hereinafter referred to as DEA) Special Agent (hereinafter referred to as SA) James Allen appeared and testified on behalf of the government. A supplemental evidentiary hearing was convened on January 28, 1993 to admit into evidence a Phillips screw which had been removed from the plastic vent cover of the right rear

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door of the Oldsmobile, and to place upon the record the parties' stipulation that no rust appeared on the screw. Based on the testimony and evidence adduced at such hearings, as well as having considered the briefs and arguments of the parties, this Court makes its findings of fact and proposed dispositions of such motions.

Findings of Fact

On Friday, December 11, 1992 MCSD plain clothes Detective Michael Pautz, a twenty (20) year veteran who has been assigned to the Drug Enforcement Unit for two (2) years, was engaged in a routine survey of motels located along South 27th Street, Milwaukee, Wisconsin looking for drug trafficking activity. At the Suburban Motel, 4600 South 27th Street, Milwaukee, Wisconsin, he observed a 1981 two (2) door Oldsmobile automobile with California license plates 2YOY835 parked in front of room 4. Based upon his experience and training in drug interdiction, Pautz knew an older two (2) door GM vehicle is often used to transport drugs and California is a source state for controlled substances; consequently, he contacted his dispatcher to check on the license plate. The dispatcher advised Pautz the vehicle was listed to one Miguel Ornealas of 830 North 16th Street, San Jose, California with an additional name of "Ledesma." However, Pautz was not sure whether the dispatcher indicated the name "Ledesma" came before or after the name "Ornealas." After speaking with the dispatcher, Pautz spoke with the motel clerk who disclosed, at 4:00 a.m. that morning, an individual named Ismeal Ornelas had checked into

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room 4 with another individual, without prior reservations, and was due to check out at 11:00 a.m.

Pautz then requested his partner, MCDS plain clothes Detective Donald Hurrle, meet him at the motel. Upon Hurrle's arrival in an unmarked car approximately fifteen (15) to twenty (20) minutes later, Pautz briefed him about the Oldsmobile and the occupants of room 4. Pursuant to Hurrle's suggestion, Pautz contacted the Milwaukee DEA office and asked for a Narcotics and Dangerous Drugs and Information Systems (hereinafter referred to as NADDIS) check on the names Ismeal Ornelas and Miguel Ledesma Ornealas. A short time later, Pautz was advised both names appeared on NADDIS and was given the following information: Miguel Ledesma Ornealas, a/k/a Miguel Ledesma-Lemus, with a date of birth September 29, 1945, 5'6", 150 pounds, Hispanic male was a heroin dealer from El Centro, California; Ismeal Ornelas, Jr., from Tuscon, Arizona was a 1,000 kilogram a month cocaine dealer. Pautz is not familiar with the geography of California and did not know that San Jose and El Centro, California are 600 miles apart. Upon receiving the NADDIS information, Pautz and Hurrle decided to conduct surveillance of room 4 of the Suburban Motel and to summon to the scene MCDS Detective Lyle Luedke, the narcotics dog handler for the Drug Enforcement Unit, because they suspected the Oldsmobile contained drugs.

Shortly after 9:30 a.m. Luedke, in plain clothes, arrived in an unmarked car at the scene, together with the narcotics detection dog. In the K-Mart parking lot across the street from the Suburban Motel, Detective Hurrle advised Luedke they were conducting

surveillance of room 4 of the Suburban Motel which they believed was occupied by a possible drug courier, Ismeal Ornelas, and another individual, whose identity was unknown. He was further advised check-out time for room 4 was 11:00 a.m. and, if time permitted, the exterior of the Oldsmobile should be "sniffed" by the drug detection dog.

Not long after Luedke arrived, Pautz departed the scene; Hurrle and Luedke repositioned themselves on the same side of the street as the Suburban Motel, because heavy traffic had obscured their view from the parking lot, and continued to conduct surveillance of room 4 from their separate cars which were parked approximately 250 yards away. After approximately forty-five (45) minutes, Hurrle observed an individual, later identified as Saul, open the hood of the Oldsmobile, tinker briefly under the hood, and start the ignition. He then returned to the room to pick up luggage and loaded it into the trunk. The other individual, later identified as Ismeal, exited room 4 and assumed a position in the front passenger seat of the Oldsmobile while Saul went briefly into the motel office. Shortly thereafter, Saul returned to the vehicle and positioned himself in the driver's seat.

At this point, the officers drove their separate unmarked vehicles to parking spaces on either sides of the Oldsmobile. However, the position of their cars did not box in the Oldsmobile and prevent it from leaving the scene. Both officers were dressed in plain clothes. Hurrle, who had no visible gun, proceeded to the driver's side of the vehicle and Luedke, who had a gun visible but not

drawn, proceeded to the passenger side. Hurrle identified himself as a law enforcement officer, asked the occupants of the vehicle whether he could speak to them, and inquired whether they were in possession of any illegal drugs or contraband. Both occupants responded, almost simultaneously, they had nothing illegal or anything like that. In response to a request for identification, both Saul and Ismeal produced identifying documents. Luedke reviewed the California driver's license produced by Ismeal, listing Ismeal's residence as Martinez, California. Ismeal responded in the affirmative to Luedke's inquiry whether he had just arrived from California. Luedke did not realize there was a discrepancy between the NADDIS report listing Ismeal Ornelas as being from Tucson, Arizona and the fact the Ismeal before him was apparently from California. The identification documents produced by Saul and Ismeal were retained by the law enforcement officers. At Hurrle's request Saul, the driver, consented to have the officers look inside the vehicle. In fact, Saul opened the trunk of the Oldsmobile with a key and held the trunk lid up to allow Hurrle to search it and the luggage inside. While the trunk was being searched, Saul was very calm and Ismeal was also calm, but shaking.

When Hurrle announced he had completed the search of the trunk, with negative results, Luedke proceeded to the passenger area of the vehicle and checked to see whether the back seat was loose. Upon finding it was not, he examined the right rear quarter panel near the handle. He found this panel to be loose. Based upon his training, Luedke suspected the panel had been removed and contraband

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was hidden inside. Luedke testified he then observed the vent area of the door, noticing the presence of rust in the groove of the Phillips screw used to attach the vent cover, which led him to believe the vent cover had recently been removed. Luedke then released the screw, dismantled the vent area of the door, and exposed a cavity approximately five (5) inches high and four (4) inches wide which contained a paper bag in which he felt a hard block. After unsuccessfully attempting to remove the bag through the vent opening, Luedke removed the interior panel of the right rear door, retrieved the paper bag, and told Hurrle he had "found something." Luedke tore open the bag, revealing a block of cocaine wrapped in aluminum foil and tape.

At that point, the defendants were handcuffed, placed under arrest, and placed in separate cars. Sometime after the cocaine was found, Luedke had his dog sniff the Oldsmobile, but no other cocaine was detected. At the scene, Hurrle advised Ismeal of his Miranda rights after he was placed in Hurrle's car, although he was not questioned until approximately two (2) hours later at the MPD.

Upon arrival at the MPD, Ismeal was taken to an interrogation room approximately eight (8) by ten (10) feet in size, where he remained in leg irons for approximately an hour. At 1:08 p.m., Pautz again advised Ismeal of his Miranda rights and Pautz and Hurrle began to interview Ismeal. Shortly after the commencement of the interview, which was taped, Hurrle stated to Ismeal:

> I want to tell you if you cooperate with us we can make you one promise and one promise only . . . we will speak on your behalf to the Assistant District Attorney or the U. S. Attorney

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> or to the Court if necessary and advise them that you cooperated with us, o'k. We cannot at this point tell you that you are not going to jail. We can't tell that you're going to get a lesser sentence because you cooperated with us. All we can tell you is one thing. We will speak on your behalf. We will tell them that you cooperated with us. That could mean a whole lot and more than likely will mean a lot to those people.

Sometime later in the interview, Hurrle told Ismeal "We'll tell the DA or the United States Attorney that you told us something and we found out later that it was a flat out lie and then you don't get in any deals more than likely." During the course of the interview, Ismeal stated he understood his Miranda rights, never asked for an attorney, he did not appear to be under the influence of alcohol or drugs, he was cooperative and experienced no difficulty communicating with the officers in English. The interview ended at 1:45 p.m.

At approximately 1:30 p.m. MCDS Gil Pagan, a 4-1/2 year veteran assigned to the Drug Enforcement Unit since September 1991 whose native language is Spanish and has been interpreting in an unofficial capacity for thirty-two years and in an official capacity since August 8, 1988, albeit without any formal training in interpretation, advised Saul of his Miranda rights using a standard English advice of rights card which he translated into Spanish. After Pagan interpreted each right from English into Spanish, Saul stated he would be willing to cooperate.

About 2:00 p.m. Hurrle and Pautz entered the fourteen (14) by ten (10) conference room where Saul and Pagan had been waiting and the interview of Saul commenced. Pagan acted as interpreter throughout most of the interview; however, there were times during the

course of the interview where Saul understood questions posed to him by Hurrle and responded in English without the assistance of Pagan. Saul was advised that the only thing law enforcement officers would do for him, if he decided to cooperate, was to inform the D.A. or the Court of his cooperation, but that they did not guarantee him anything. During the course of the interview, Saul was coherent and fairly calm, although he seemed concerned about his situation. During the course of the interview, the deputies engaged in banter among themselves which was not translated into English by Pagan. Pautz asked, "Do they have courts in Mexico or do they have standard procedures." Hurrle responded "Due process? A wall?" In return, Pagan added, "Seven muskets in front of you?" The interview of Saul during which he made no incriminating statements lasted approximately thirty (30) minutes.

At approximately 2:45 p.m. Luedke reinterviewed Ismeal because he wanted to know how the cocaine got into the right rear quarter panel of the Oldsmobile - information which neither defendant had disclosed during their interviews. At the commencement of the interview, which was conducted in a five (5) by seven (7) foot room containing a desk, two (2) chairs, and an ashtray, Luedke advised Ismeal of his Miranda rights by reading verbatim from an advice of rights card. Pautz was present during the interview. No threats or promises were made to Ismeal and he was allowed to smoke. His demeanor was very solemn. Throughout the interview, he stated he understood his rights and proceeded to make a statement that Saul had placed the cocaine in the cavity of the right rear quarter panel door.

At the hearing MCDS Sergeant Roger R. Wiggins, a twenty (20) year veteran who has been second-shift supervisor of the Communications Bureau for four (4) years, testified his bureau routinely runs Department of Motor Vehicle computer checks using state license plate numbers to obtain the owner's name, residence, and the make of car to which the license is listed. He stated additional information can be obtained by making an administrative request. On January 19, 1993 Wiggins made a license check and an administrative inquiry on the Oldsmobile. The initial request revealed the vehicle belonged to "Ornelas Miguel Ledesma" of San Jose, California. The administrative request showed the owner of the vehicle to be Miguel Ornelas, also known as "Ledesma Miguel Ornelas"; an updated San Jose, California street address; the owner's sex; date of birth; height; weight; hair color; and eye color.

Officer Pagan reviewed the administrative request and stated the alternative name listed for Miguel Ornelas was for a person named "Miguel Ornelas-Ledesma." He further testified the majority of Hispanics use their father's name first and then their mother's name.

Analysis

Although the government initially disputed the defendants' expectation of privacy in the Oldsmobile, during the course of the evidentiary hearing, it conceded both defendants had the requisite expectation of privacy to allow them to assert that their Fourth Amendment rights had been violated by the search of the vehicle. Consequently, the threshold issue in this case is whether the

defendants were subjected to a seizure by law enforcement officers. The law is well established that an encounter between a law enforcement officer and a citizen implicates the Fourth Amendment only if the officer seizes the citizen. United States v. Mendenhall, 446 U.S. 544, 555 (1980); Terry v. Ohio, 392 U.S. 1, 19 (1968). If a seizure does not occur; and therefore, the encounter is consensual in nature (limited to questioning about an individual's identity and requesting identification), then police do not need justification for this contact. INS v. Delgado, 466 U.S. 210, 216-17 (1984); United States v. Dyer, 784 F.2d 812, 815-16 (7th Cir. 1976); United States v. Borys, 766 F.2d 304, 310-11 (7th Cir. 1985), cert. denied, 474 U.S. 1082 (1986). The test for determining whether a police-citizen contact rises to the level of a Fourth Amendment seizure is an objective one. United States v. Espinosa-Alvarez, 839 F.2d 1201, 1205 (7th Cir. 1988); United States v. Pavelski, 789 F.2d 485 (7th Cir.), cert. denied, ___ U.S. ___, 107 S.Ct. 322 (1986). This formulation is whether, based on the totality of circumstances, a reasonable person would believe his freedom of movement is restrained or believes he is at liberty to disregard a police officer's request for information. If the latter, then a seizure has not occurred. United States v. Espinosa-Alvarez, 839 F.2d at 1205.

In order to assess the reasonableness of the seizure, this Court must weigh the circumstances on the Fourth Amendment "scale" for police/citizen encounters. See United States v. Chaidez, 919 F.2d 1193, 1197 (7th Cir. 1990). "[A] person has been 'seized' within the meaning of the Fourth Amendment . . . . only if, in view of all of the

circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." Michigan v. Chesternut, 486 U.S. 567, 573 (1988) (citations omitted). Recently the Court of Appeals for this Circuit summarized the three (3) categories for police/citizen encounters in relation to the Fourth Amendment as follows:

> The first category is an arrest, for which the Fourth Amendment requires that police have probable cause to believe a person has committed or is committing a crime. Beck v. Ohio, 379 U.S. 89, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964). The second category is an investigatory stop, which is limited to a brief, non-intrusive detention. This is also a Fourth Amendment "seizure", but the officer need only have specific and articulable facts sufficient to give rise to a reasonable suspicion that a person has committed or is committing a crime. United States v. Brignoni-Ponce, 422 U.S. 873, 881-82, 95 S.Ct. 2574, 2580-81, 45 L.Ed.2d 607 (1975); Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). The third category involves no restraint on the citizen's liberty, and is characterized by an officer seeking the citizen's voluntary cooperation through non-coercive questioning. This is not a seizure within the meaning of the Fourth Amendment. United States v. Mendenhall, 446 U.S. 544, 553-55, 100 S.Ct. 1870, 1876-77, 64 L.Ed.2d 497 (1980); Terry, 392 U.S. at 19, n.16, 88 S.Ct. at 1879, n.16.

United States v. Johnson, 910 F.2d 1506, 1508 (7th Cir. 1990), cert. denied, ___ U.S. ___, 111 S.Ct. 764 (1991). See also, United States v. Adebayo, No. 91-2138, slip op. at 8 (7th Cir. Feb. 5, 1993).

"So long as a reasonable person would feel free to disregard the police and go about his business, the encounter is consensual and no reasonable suspicion is required." United States v. Williams, 945 F.2d 192, 195 (7th Cir. 1991). "A person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the

circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." United States v. Withers, 972 F.2d 837, 841 (7th Cir. 1992) (citations omitted).

The distinction between a consensual encounter and a stop is one of degree. Relevant factors include whether the encounter occurred in a public or private place, whether the suspect consented or refused to talk to the police, whether the police informed the suspect that he was not under arrest and was free to leave, whether the police removed the suspect to another area, whether the suspect felt capable of refusing to consent to the search, and whether the suspect eventually departs the area without hinderance. See United States v. Withers, 972 F.2d at 842. Other factors in this determination include: "The threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or the tone of voice indicating that compliance with the officer's request might be compelled." United States v. Withers, 972 F.2d at 842 (quoting United States v. Mendenhall, 446 U.S. 544, 554-55 [1980]). Additionally, the "lengthy" retention of documents, such as identification and airline tickets, is a factor in determining whether a stop has occurred. See United States v. Withers, 972 F.2d at 842.

Here, the encounter between the law enforcement officers and the occupants of the 1981 Oldsmobile was initially a Terry stop. Within moments of the encounter, Hurrle was in possession of their identification documents, questioning them as to whether they had drugs in the car, and requesting permission to search the vehicle.

The defendants were never told they were not under arrest or that they were free to leave. At the time they approached the defendants, the law enforcement officers had knowledge of "specific and articulable facts which, when taken together with the rational inferences from those facts", could reasonably cause them to conclude, in light of their experiences, that criminal activity was afoot. Terry v. Ohio, 392 U.S. 1, 21 & 30 (1968). Pautz specifically testified it had been his experience that vehicles similar to the Oldsmobile are used to transport narcotics. In addition, Pautz learned the registered owner of the vehicle was from a source state, the owner's name came back on NADDIS as being a drug trafficker, and the name of Ismeal Ornelas, Jr. came back on NADDIS as also being a drug trafficker. An additional factor contributing to the reasonable suspicion of drug trafficking was the defendants' 4:00 a.m. check-in to the motel. Consequently, this Court concludes the defendants were subjected to an investigatory detention, based on reasonable suspicion, and the seven (7) to ten (10) minute detention until the cocaine was discovered was reasonable. See Piska v. City of Stevens Point, Wis., 823 F.2d 1168, 1176 (7th Cir. 1987) (ten [10] minute stop reasonable); United States v. Davies, 768 F.2d 893, 902 (7th Cir.), cert. denied, 474 U.S. 1008 (1985) (forty-five [45] minute stop reasonable); United States v. Kapperman, 764 F.2d 786, 792 (11th Cir. 1985) (ten [10] minute stop reasonable).

The next question to be addressed is whether the Fourth Amendment was violated by the law enforcement officers' search of the Oldsmobile. The Fourth Amendment permits law enforcement officers to conduct a warrantless search, without probable cause, if an authorized

individual voluntarily consents to the search. Florida v. Jimeno, ___ U.S. ___, 111 S.Ct. 1801, 1803 (1991); Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973). The burden is upon the government to demonstrate, by a preponderance of the evidence under the totality of the circumstances, that consent is freely and voluntarily given. Schneckloth v. Bustamonte, 412 U.S. at 222-27.

The record before the Court clearly establishes consent to search the Oldsmobile. Saul indicated the law enforcement officers could search the vehicle and neither defendant placed any restrictions on the areas the officers could search or, in the course of the search, asked them to stop. However, under United States v. Garcia, 897 F.2d 1413, 1419-20 (7th Cir. 1990), police may not dismantle parts of a car body to search for hidden compartments when they have merely obtained permission to "look in the car" for illegal drugs. Unless the police have probable cause to believe the car contains drugs concealed in hidden compartments, the opening of door panels is "inherently invasive and extends beyond consent given." United States v. Garcia, 897 F.2d at 1420. Here, Luedke's clear testimony was that rust within the groove of the head of the Phillips screw holding the plastic vent cover in place caused him to believe it had been removed and drugs were concealed within the door panel. But, the screw itself belies this testimony. The record discloses no evidence from which Luedke could conclude that a hidden panel contained contraband. Consequently, the Court finds there was not probable cause to dismantle the panel.

Even though the search was beyond the scope of the consent and was not justified by independent probable cause, the cocaine found will not be suppressed as evidence under the inevitable discovery exception to the Fourth Amendment exclusionary rule of Nix v. Williams, 467 U.S. 431, 433 (1984), which holds if the prosecution can establish by a preponderance of evidence that the evidence ultimately or inevitably would have been discovered by lawful means, even if no violation of any constitutional provision had taken place, then the evidence should be received. The stated rationale for the doctrine is that the interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a worse position, than they would have been if no police error or misconduct had occurred in those circumstances where evidence would have been discovered independent of a constitutional violation. Nix v. Williams, 467 U.S. at 444. The court further stated that, under this doctrine, the prosecution is not required to prove the absence of bad faith as such a requirement would result in withholding from juries relevant and undoubted truth that would have been available to police absent any unlawful police activity. Nix v. Williams, 467 U.S. at 445.

This Court finds, by a preponderance of the evidence, that regardless of the government's good or bad faith, the cocaine would have inevitably been discovered any way. This Court bases its conclusion upon the inevitability of a canine sniff of the Oldsmobile which does not compromise any legitimate interest in privacy and,

therefore, is not a Fourth Amendment search. See United States v. Vasquez, 909 F.2d 235, 238 (7th Cir. 1990) (citing cases). Luedke's trained drug detection dog was waiting at the scene in his vehicle. Clearly, the defendants would not be allowed to depart from the Suburban Motel without their vehicle being "sniffed" if cocaine was not otherwise discovered. See United States v. Buchanan, 910 F.2d 1571 (7th Cir. 1990).

The final issue to be addressed is the admissibility of the statements obtained from Saul and Ismeal. The government has indicated it does not intend to introduce into evidence any statements made by Saul as a part of its case in chief. Thus, the sole issue as to Saul is the voluntariness of his statements under Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973), in the event the government intends to introduce his statement for impeachment purposes.

In Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973), the United States Supreme Court detailed the factors to be considered when evaluating whether a defendant's "will was overborne" in the giving of statements:

> [T]he Court has assessed the totality of all the surrounding circumstances - both the characteristics of the accused and the details of the interrogation. Some of the factors taken into account include the youth of the accused, his lack of education, or his low intelligence, the lack of any advise to the accused of his constitutional rights, the length of detention, the repeated and prolonged nature of the questioning, and the use of physical punishment such as the deprivation of food or sleep.

(Citations omitted.) Although Hurrle told Saul he would bring any cooperation on his part to the attention of prosecutors and/or the

Court, there is no prohibition on the buying of information with honest promises of consideration. See United States v. Rutledge, 900 F.2d 1127, 1130 (7th Cir.), cert. denied, ___ U.S. ___, 111 S.Ct. 203 (1990). The police are allowed to play on a suspect's ignorance, his anxieties, his fears, and his uncertainties; they are just not allowed to magnify those fears, uncertainties, and so forth to the point where rational decision becomes impossible. See United States v. Rutledge, 900 F.2d at 1130 (7th Cir.); United States v. Harris, 914 F.2d 927, 933 (7th Cir. 1990). There is no evidence the statement obtained from Saul was the result of his will being overborne. Thus, there is no basis for suppression of the statements of Saul.

Nor is there any basis for suppression of the statements obtained from Ismeal. Ismeal was advised of his constitutional rights, pursuant to Miranda v. Arizona, 384 U.S. 436 (1966) and made a knowing and intelligent waiver of those rights as required by Moran v. Burbine, 475 U.S. 412 (1986). The record does not disclose that the statements which Ismeal seeks to suppress were obtained by overbearing his will. See Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973).

In this case, Ismeal made a knowing and intelligent decision to cooperate with law enforcement authorities and to provide them with certain information. Although Ismeal was told that any cooperation on his part would be brought to the attention of prosecutors and/or the Court, there is no evidence this representation overbore his free will. Since Miranda and its progeny are designed to protect criminal defendants from coercive police tactics which would produce

involuntary confessions, they afford no protections to criminal defendants who, of their own volition, decide to make statements and otherwise cooperate with authorities.

In sum, this Court concludes no Fourth Amendment violation occurred when law enforcement officers stopped Saul and Ismeal. Furthermore, although the search of the Oldsmobile exceeded the scope of the consensual search, the cocaine would have been inevitably discovered and, therefore, is not subject to suppression. Finally, Ismeal's statements were not obtained in violation of his constitutional rights and Saul's statement was voluntary. Accordingly, this Court will recommend the defendants' motions to suppress evidence and statements be denied.

SAUL'S MOTION FOR SEVERANCE

Saul moves the Court for issuance of an order, pursuant to Fed. R. Crim. P. 14, severing his trial from that of Ismeal relying upon Bruton v. United States, 391 U.S. 123 (1968) which holds admission of a codefendant's confession at a joint trial where the codefendant does not testify and, therefore, cannot be cross-examined, violates a defendant's Sixth Amendment right to confrontation. In the alternative, Saul seeks dismissal of the indictment.

In response the government indicates it has concluded it is not possible to redact Ismeal's confession to delete reference to Saul in a manner which does not still clearly implicate Saul. Consequently, the government concedes severance of the defendants'

trials is necessary. Accordingly, Saul's motion for severance will be granted.

CONCLUSION

NOW THEREFORE, IT IS HEREBY RECOMMENDED that the United States District Judge enter an order **DENYING** defendant Saul Ornelas' motion to suppress and exclude physical evidence;

IT IS FURTHER RECOMMENDED that the United States District Judge enter an order **DENYING** defendant Saul Ornelas' motion to suppress statements;

IT IS ALSO RECOMMENDED that the United States District Judge enter an order **DENYING** defendant Ismeal Ledesma Ornelas' motion to suppress seizure of items from the 1981 Oldsmobile and the statements of the defendant; and,

IT IS ORDERED that defendant Saul Ornelas' motion for severance be and hereby is **DENIED.**

Written objections to the foregoing recommendations and orders may be filed in duplicate with the Clerk of Court on or before

AO 72A
(Rev. 8/82)

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R/O :ORNELAS MIGUEL LEDESMA. 830 N 16TH ST CITY:SAN JOSE C.C.:43
ZIP#:95112
RCID:11/04/92 OCID:12/14/88 LOCD:9

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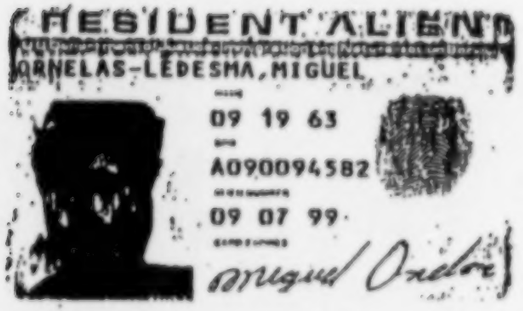
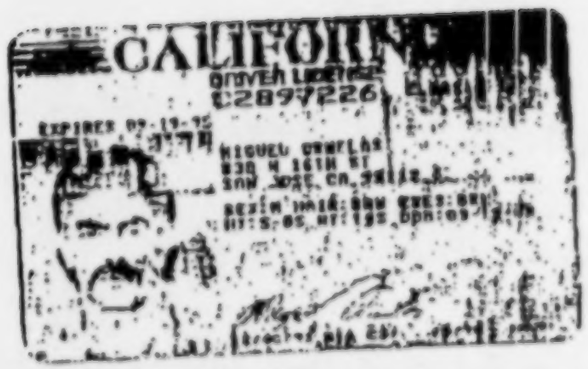
FND -

UNITED STATES DISTRICT COURT
EASTERN DIST. OF WISCONSIN
Case No. 92-Cr-243
Exh. No. D # E.
Date Rec'd 1/22/93
Deputy Clerk K Zuid

ISMeal Ornelas





UNITED STATES DISTRICT COURT

Eastern District of Wisconsin

UNITED STATES OF AMERICA

vs.

ISMAEL ORNELAS-LEDESMA

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: 92-CR-243

FILED
U.S. DISTRICT COURT EAST. DIST. WISC.
MAY 21 1993
AT ___ O'CLOCK ___ M
SOFRON B. NEDRLSKY

Brian W. Gleason
Defendant's Attorney

Penelope C. Fleming
Assistant U.S. Attorney

DEFENDANT:

pleaded guilty to count One
was found guilty on count(s) _____ after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following nses:

e & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
J.S.C. §§ 841(a)(1)	possession with intent to	December 11, 1992	1
J.S.C. § 2	distribute cocaine		

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The tence is imposed pursuant to the Sentencing Reform Act of 1984.
The defendant has been found not guilty on count(s) _____
and is discharged as to such count(s).
Count _____ is dismissed on the motion of the United States.
It is ordered that the defendant shall pay a special assessment of $ 50.00 for count One, which shall be due [ ] immediately [x] as follows: prior to the expiration of this sentence.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this strict within 30 days of any change of name, residence, or mailing address until all fines, stitution, costs, and special assessments imposed by this judgment are fully paid.

fendant's Soc. Sec. No.: 612-46-6929 & 564-77-1676

fendant's Date of Birth: October 14, 1968

fendant's Mailing Address:

acine County Jail
17 Wisconsin Avenue
acine, WI 53403

fendant's Residence Address:

May 20, 1993
Date of Imposition of Sentence

Signature of Judicial Officer

Hon. Rudolph T. Randa
U.S. District Judge
Name & Title of Judicial Officer

5/21/93
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons e imprisoned for a term of 60 months.

The court makes the following recommendations to the Bureau of Prisons:

that the defendant serve his sentence at a facility near San Jose, California

The defendant is remanded to the custody of the United States Marshal.
The defendant shall surrender to the United States Marshal for this district.
[ ] at _____ a.m. p.m. on _____
[ ] as notified by the United States Marshal.
The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons,
[ ] before 2 p.m. on _____
[ ] as notified by the United States Marshal.
[ ] as notified by the probation office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____, with a certified copy of his judgment.

United States Marshal

By _____
Deputy Marshal

UNITED STATES DISTRICT COURT

Eastern District of Wisconsin

UNITED STATES OF AMERICA

vs.

SAUL ORNELAS

AMENDED
JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: 92-CR-243

FILED
U.S. DISTRICT COURT EAST. DIST. WISC.
Jun 1 1993
AT ___ O'CLOCK ___ M
BOFRON B. MEDILSKY

Robert G. LeBell
Defendant's Attorney

Penelope C. Fleming
Assistant U.S. Attorney

DEFENDANT:

pleaded guilty to count One
was found guilty on count(s) _____ after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following nses:

e & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
.S.C. §§ 841(a)(1) .S.C. § 2	possession with intent to distribute cocaine	December 11, 1992	1

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The ence is imposed pursuant to the Sentencing Reform Act of 1984.
The defendant has been found not guilty on count(s) _____ and is discharged as to such count(s).
Count _____ is dismissed on the motion of the United States.
It is ordered that the defendant shall pay a special assessment of $ 50.00 for count One, which shall be due [ ] immediately [x] as follows: as directed by U.S. Probation to Clerk Court.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this rict within 30 days of any change of name, residence, or mailing address until all fines, itution, costs, and special assessments imposed by this judgment are fully paid.

ndant's Soc. Sec. No.: 393-02-2916

ndant's Date of Birth: June 28, 1968

ndant's Mailing Address:

ndant's Residence Address:

24 Begonia Street
caster, California

May 28, 1993
Date of Imposition of Sentence

Signature of Judicial Officer

Hon. Rudolph T. Randa
U.S. District Judge
Name & Title of Judicial Officer

6/1/93
Date

Copy mailed to attorneys for parties by the Court pursuant

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons imprisoned for a term of 63 months.

he court makes the following recommendations to the Bureau of Prisons:

that the defendant serve his sentence at Lompoc, California

he defendant is remanded to the custody of the United States Marshal.
he defendant shall surrender to the United States Marshal for this district.

[ ] at _____ a.m. p.m. on _____
[ ] as notified by the United States Marshal.

he defendant shall surrender for service of sentence at the institution designated by the ureau of Prisons,
[ ] before 2 p.m. on _____
[ ] as notified by the United States Marshal.
[ ] as notified by the probation office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____, with a certified copy of judgment.

_____
United States Marshal

By _____
Deputy Marshal

idant: Saul Ornelas
Number: 92-CR-243

STATEMENT OF REASONS

The court adopts the factual findings and guideline application in the presentence report.

OR

The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

eline Range Determined by the Court:

otal Offense Level: 24

riminal History Category: I

mprisonment Range: 51 to 63 months

upervised Release Range: 4 to 5 years

ine Range: $ 12,500.00 to $ 1,000,000.00

[x] Fine is waived or is below the guideline range, because of the defendant's inability to pay.

estitution: $ _____

[ ] Full restitution is not ordered for the following reason(s):

The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.

OR

The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

sentence departs from the guideline range

[ ] upon motion of the government, as a result of defendant's substantial assistance.
[ ] for the following reasons:

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

Submitted March 2, 1995

Decided April 18, 1995

UNPUBLISHED ORDER
NOT TO BE CITED
PER CIRCUIT RULE 53

Before

Hon. Richard A. Posner, Chief Judge

Hon. Joel M. Flaum, Circuit Judge

Hon. Daniel A. Manion, Circuit Judge

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*	**Appeal from the United States District Court for the Eastern District of Wisconsin.**
Nos. 94-3349, 94-3350 v.	**No. 92 CR 243**
SAUL ORNELAS, ISMAEL ORNELAS LEDESMA, *Defendants-Appellants.*	**Rudolph T. Randa,** *Judge.*

Order

This is a sequel to the decision of this panel in *United States v. Ornelas-Ledesma*, 16 F.3d 714 (7th Cir. 1994), and familiarity with that decision is assumed. Briefly, we held that the district court had erred in denying the defendants' motion to suppress the fruits of a search of their automobile without making a determination of the credibility of Office Luedke's testimony that the panel behind which he found the drugs was loose. We remanded with directions to determine whether the panel was loose; if it was not, to grant the motion; and if it was, to consider whether the loose panel, in conjunction with other suspicious circumstances discussed in our opinion, established probable cause for the search.

On remand, the district judge referred the issue of Luedke's credibility to the magistrate judge before whom Luedke testified and who had recommended that the motion be granted. Without granting a new hearing, the magistrate judge reported that he believed Luedke had testified truthfully about the loose panel. The district judge then determined that when the loose panel was considered in conjunction with the other circumstances, the search was indeed supported by probable cause.

The defendants appeal. Our review is deferential. The district judge's finding of probable cause may be set aside only if clearly erroneous. We do not find clear error. The district judge's opinion, although brief, adequately reviews the circumstances on

which the decision to search the car was based and explains why taken as a totality they gave the officers probable cause to conduct the search. The judgment of the district court must therefore be, and it is,

AFFIRMED.

UNITED STATES of America,
Plaintiff-Appellee,

v.

Ismael ORNELAS-LEDESMA and Saul Ornelas, Defendants-Appellants.

Nos. 93-2356, 93-2405.

United States Court of Appeals,
Seventh Circuit.

Argued Dec. 10, 1993.

Decided Feb. 10, 1994.

Defendants were convicted in the United States District Court for the Eastern District of Wisconsin, Rudolph T. Randa, J., of illegal possession of a controlled substance with intent to distribute, and they appealed. The Court of Appeals, Posner, Chief Judge, held that: (1) police officers had reasonable suspicion of criminal activity necessary for investigatory stop of defendants' vehicle, but (2) remand was required to determine whether police officer had probable cause to remove door panel of vehicle and search for drugs.

Vacated and remanded.

1. Arrest ⇐63.5(6)

Narcotic and Dangerous Drug Information System (NADDIS) information indicating that both registered owner of defendant's car and name on motel registry corresponded to names of suspected drug dealers, together with characteristics of defendants that matched drug courier profile, including their origin from drug source state and their use of type of automobile frequently used to conceal drugs, gave police reasonable suspicion of criminal activity necessary for investigatory stop. U.S.C.A. Const.Amend. 4.

2. Arrest ⇐63.4(11)
Drugs and Narcotics ⇐182.2

Unverified, uncorroborated entry in Narcotic and Dangerous Drug Information System (NADDIS) cannot by itself furnish probable cause for arrest or search. U.S.C.A. Const.Amend. 4.

3. Arrest ⇐63.5(4)

Uncorroborated anonymous 'tip,' even when it comes from law enforcement authorities, does not by itself justify investigatory stop. U.S.C.A. Const.Amend. 4.

4. Arrest ⇐63.5(4)

Mistaken premise can furnish grounds for *Terry* stop, if officers do not know that it is mistake and are reasonable in acting upon it. U.S.C.A. Const.Amend. 4.

5. Criminal Law ⇐1158(2)

Review of district court's determination that investigatory stop is supported by reasonable suspicion was for clear error, rather than plenary. U.S.C.A. Const.Amend. 4.

6. Criminal Law ⇐1181.5(7)

Remand was required to determine whether police officer, who had reasonable suspicion that defendants were drug dealers based on Narcotic and Dangerous Drug Information System (NADDIS) inquiry had probable cause to remove door panel of vehicle and search for drugs, where credibility of officer's testimony that he observed loose door panel had not been determined. U.S.C.A. Const.Amend. 4.

7. Criminal Law ⇐1158(2)
United States Magistrates ⇐29

Standard of judicial review for determination of probable cause is clear error; this is so whether determination is made by magistrate judge or by district judge. U.S.C.A. Const.Amend. 4.

8. United States Magistrates ⇐26

Even if district judge can reject magistrate judge's determinations of credibility without hearing witnesses' testimony himself or herself, he or she cannot be permitted to ignore issue of credibility altogether when making probable cause determination. U.S.C.A. Const.Amend. 4.

9. Criminal Law ⇐1178

Government waived defense of inevitable discovery in determining whether probable cause supported search of door panel in defendants' automobile by failing to defend on appeal magistrate judge's determination that drugs in car's door panel would have been

inevitably discovered by narcotics detection dog even if police officer had not seen loose door panel. U.S.C.A. Const.Amend. 4.

Penelope C. Fleming (argued), Office of U.S. Atty., Milwaukee, WI, for plaintiff-appellee U.S.

Brian W. Gleason (argued), Milwaukee, WI, for defendant-appellant Ismael Ornelas–Ledesma.

Robert G. LeBell (argued), Styler, Kostich, LeBell & Dobroski, Milwaukee, WI, for defendant-appellant Saul Ornelas.

Before POSNER, Chief Judge, and FLAUM and MANION, Circuit Judges.

POSNER, Chief Judge.

Ismael Ornelas–Ledesma and Saul Ornelas were convicted of illegal possession of a controlled substance with intent to distribute it and were sentenced to 60 and 63 months in prison, respectively. The appeal challenges the denial of their motion to exclude from evidence the cocaine seized from "their" 1981 Oldsmobile. We say "their" Oldsmobile, although it was registered to someone else, because the government does not question their right, akin to that of a tenant, bailee, borrower, or other lawful occupier or possessor, to object to the seizure. The cases are quicker to draw the analogy in the case of the driver of a vehicle, *United States v. Garcia*, 897 F.2d 1413, 1418–19 (7th Cir.1990); *United States v. Soto*, 988 F.2d 1548, 1553 (10th Cir.1993); *United States v. Miller*, 821 F.2d 546, 548–49 (11th Cir.1987), than in the case of a passenger, *Rakas v. Illinois*, 439 U.S. 128, 148–49, 99 S.Ct. 421, 433, 58 L.Ed.2d 387 (1978); *United States v. Lechuga*, 925 F.2d 1035, 1037, 1041 n. 3 (7th Cir. 1991); *United States v. Roberson*, 6 F.3d 1088, 1091 (5th Cir.1993), but the government does not ask us to make that distinction here.

The defendants argue that the stop which led to their consenting to the search of the car violated the Fourth Amendment, invalidating the consent and hence the search; and that independently of this the seizure of the drugs, which was from the inside of the door of the car, violated the Fourth Amendment because, even if a superficial search of the car was proper as an incident of the stop, the officers needed and lacked probable cause to open the compartment and seize its contents.

Police officers in Milwaukee keep a regular watch on motels, looking for drug runners. Cruising through a motel parking lot one day in 1992, a detective named Pautz, a two-year veteran of the Milwaukee County Sheriff's Drug Enforcement Unit, spotted a 1981 two-door Oldsmobile with a California license plate. Pautz was interested. Two-door General Motors cars of that vintage are believed by law enforcement authorities to be drug traffickers' favorites (though not their only favorites, *United States v. Sharpe*, 470 U.S. 675, 682 n. 3, 105 S.Ct. 1568, 1573 n. 3, 84 L.Ed.2d 605 (1985); *United States v. Ocampo*, 890 F.2d 1363, 1366 (7th Cir.1989)) because it is easy to conceal drugs in them. And California, like other states on the eastern, western, and southern borders of the United States, is a state from which drugs are shipped to other states, a "source" state. So Pautz called up his dispatcher on his car radio and asked him to find out whom the car was registered to. Now in fact it was registered to "Ornelas, Miguel Ledesma," of San Jose, California, who may or may not be related to one of the defendants. But we do not know what exactly the dispatcher told Pautz or what exactly Pautz understood—whether it was "Miguel Ledesma Ornelas" or "Miguel Ornelas Ledesma." Confusion on this score is understandable, though not justifiable. Spanish naming conventions are confusing to non-Hispanic Americans. When a Hispanic has two surnames, such as Ornelas Ledesma or Ledesma Ornelas, the first is his father's last name and the second his mother's maiden name. The first is primary, and the second subordinate—exactly the reverse of the middle and last names of non-Hispanics. To a Hispanic, therefore, "Ornelas, Miguel Ledesma," would denote Miguel Ornelas Ledesma rather than, as a non-Hispanic would expect, Miguel Ledesma Ornelas. But if the motor vehicle authorities, the dispatcher, or Pautz were unfamiliar with Spanish naming conventions (and Pautz testified that he was unfamiliar with them), "Ledesma" and "Ornelas" could easily get reversed.

Pautz, believing that he had the name of the car's registered owner, entered the motel and checked the registry, which showed that an Ismael (not Miguel) Ornelas had registered at 4:00 a.m. and had been accompanied by another man. Pautz then called his partner, Detective Hurrle, to join him. When Hurrle arrived, the two officers called the Milwaukee office of the Drug Enforcement Administration and asked it to run a NADDIS check on Miguel Ledesma Ornelas from San Jose and on Ismael Ornelas. NADDIS (Narcotic and Dangerous Drug Information System) is a computerized compilation of the federal Drug Enforcement Administration's information on known and suspected drug traffickers. NADDIS reported two "hits." One was on Miguel Ledesma Ornelas, also known as Miguel Lemus–Ledesma, identified by NADDIS as a heroin dealer in El Centro, California, which is hundreds of miles from San Jose, the residence of the registered owner of the car. The other "hit" was on Ismael Ornelas, Jr., of Tucson, Arizona, reported by the computer to be a 1000-kilogram-per-month cocaine dealer, although no "wants" or warrants were outstanding against him. The officers did not attempt to obtain descriptions of the two suspected dealers, neither of whom in fact is one of or, as far as we know, related to the defendants.

Because the car was an older GM two-door, because its occupants had checked in at the motel at 4:00 a.m. without having made reservations in advance, because there were two persons rather than just one and at least one of them was Hispanic, and because they apparently had come from a "source state"—and of course because of the "hits" on similar or identical names—the officers decided to stop and question the men when they left the motel. At this point a third officer arrived, Luedke, bringing with him a drug-sniffing dog; and Pautz left. After a time, two men emerged from the motel and entered the Oldsmobile. The officers parked their cars on either side of it. Hurrle tapped the window on the driver's side, identified himself as a police officer, and asked both men for identification. Saul Ornelas, who was in the driver's seat, produced a driver's license in that name; Ismael Ornelas–Ledesma, who was in the front passenger's seat, produced a driver's license in the name of Ismael Ornelas, residing in Martinez, California. Hurrle asked whether there were any drugs in the car. The occupants said "no." Hurrle asked them for permission to search the car, and they gave their permission. The two men were not placed under arrest but the government concedes that a reasonable person in their position would not have felt free to leave. So the encounter was a so-called "*Terry* stop" (after *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)), *Michigan v. Chesternut*, 486 U.S. 567, 573, 108 S.Ct. 1975, 1979, 100 L.Ed.2d 565 (1988); *INS v. Delgado*, 466 U.S. 210, 216, 104 S.Ct. 1758, 1762, 80 L.Ed.2d 247 (1984); *United States v. Adebayo*, 985 F.2d 1333, 1338–39 (7th Cir.1993), a semi-arrest that is lawful under the Fourth Amendment if but only if the officers had a "reasonable suspicion supported by articulable facts" that the persons stopped were engaged in criminal activity *United States v. Sokolow*, 490 U.S. 1, 7, 109 S.Ct. 1581, 1585, 104 L.Ed.2d 1 (1989).

Officer Luedke inspected the interior without canine assistance and noticed a loose panel on the passenger's door. One of the screws by which the panel was fastened to the door was—Luedke testified—rusty. To him this meant that it had been removed recently. He didn't explain why, but maybe the idea is that the removal of the screw would have scraped off its chrome coating, which protected it from rusting. Suspecting that drugs were concealed behind the panel, Luedke pried it open. His hunch was correct; there was a package containing two kilograms of cocaine wrapped in aluminum foil and paper. Ornelas and Ornelas-Ledesma were then arrested.

[1] Clearly, were it not for the NADDIS hits, the officers would not have had grounds for *reasonable* suspicion that the defendants were drug traffickers. Not only is every circumstance on which the officers relied other than the hits innocent taken by itself—many Americans (approximately one in eight) are Californians, many Californians are Hispanic, many Americans drive two-door Gen-

eral Motors cars, many people check into motels very late at night (or early in the morning), many travel in pairs rather than alone, and many do not make advance reservations—but the confluence of these circumstances is pretty innocuous as well, especially since many of the circumstances are correlated rather than independent. Hispanics are disproportionately concentrated in California, and having on average lower incomes than non-Hispanic Americans are doubtless more likely than other Americans to drive two-door rather than four-door cars, older rather than newer cars, and American rather than foreign cars. They are more likely to drive than to fly and, we imagine, less likely to make reservations in advance at motels, since cheap motels don't advertise much or have 800 numbers. Nothing is more common than for people taking long trips to drive until they're tired and then—often at very odd hours—to check in at the nearest motel, of course without a reservation. And people who drive long distances late at night prefer to have someone with them. Because the "suspicious" circumstances (other than the NADDIS hits) are so strongly correlated with each other, were they considered sufficient by themselves to justify a stop the practical consequence would be that a very large proportion of all Hispanic Americans would be vulnerable to being stopped on suspicion of drug trafficking. Hispanics would be second-class citizens in the eyes of the police. Although a brief investigatory stop is less intrusive than an arrest, it is sufficiently redolent of police-state tactics for courts to insist in the name of the Fourth Amendment that its use be circumscribed.

So we must ask what the NADDIS hits added to a "drug courier profile" that seems only a little better than a dragnet for Hispanics. It would be nice to *know* something about NADDIS, but the government successfully opposed the defendants' efforts to obtain discovery aimed at determining the character and reliability of the information in the NADDIS data base, and as a result the record is bare of evidence about it. At argument the government's lawyer, while saying that she has used NADDIS herself, disclaimed any knowledge about the system except how to access it. We do not know how many names are in it currently, where exactly the names come from, whether any of the information inputted into the system is screened for reliability before being entered, whether anyone checks to make sure that errors are not made in inputting information, whether information is updated systematically, and (a closely related question) whether information discovered to be stale or inaccurate is removed from the system. Although a number of judicial opinions mention NADDIS in passing—obviously it is widely used in drug enforcement—we have found no considered judicial assessment of its reliability, although we have found occasional judicial expressions of concern about that reliability. *United States v. $7,850 United States Currency*, 7 F.3d 1355, 1358 (8th Cir.1993); *United States v. $215,300 United States Currency*, 882 F.2d 417, 419 and n. 2 (9th Cir. 1989) (per curiam); *United States v. Saperstein*, 723 F.2d 1221, 1232 (6th Cir.1983).

Maybe NADDIS is no better than a vast compendium of rumors, errors, and libels: garbage in, garbage out. That seems unlikely. It would not be heavily used by drug enforcement authorities if it were merely a random sample of the American population. Which is not to say, however, that it is *highly* reliable; concern that it may not be is heightened by the (scanty) secondary literature, which depicts NADDIS as an unselective, unweeded repository of unsubstantiated allegations, often dated. See UPI Release, "VIP Names in Drug Agency's Computer Files," July 3, 1984; Vanessa Jo Grimm, "Behemoth DEA Database Tracks Drug Smugglers," *Government Computer News*, July 8, 1991, p. 85. According to the UPI Release, as of 1984 NADDIS contained 1.5 million names, obtained from debriefings of informants and suspects and from surveillance and intelligence reports of various law enforcement agencies.

[2, 3] As an example of NADDIS's possible unreliability, we note that according to it Ismael Ornelas, Jr., of Tucson, a 1000 kilogram a month dealer—a *large* dealer—is not wanted by any law enforcement authority in the country. Maybe *that* Ornelas (who is neither Saul Ornelas nor Ismael Ornelas-Ledesma nor the registered owner of the

Olds) died years ago or is some practical joker's or desperate informant's fictional creation or is an honest man falsely accused by an enemy. Because the reliability of information stored in NADDIS is unknown, that information must, on the record before us, be reckoned no more reliable than that of an informant not known to be reliable. Therefore, since an uncorroborated tip from such an informant cannot by itself furnish probable cause for an arrest or search, *Illinois v. Gates*, 462 U.S. 213, 227, 103 S.Ct. 2317, 2326, 76 L.Ed.2d 527 (1983), an unverified, uncorroborated entry in NADDIS cannot do so either. *United States v. $7,850 United States Currency*, *supra*, 7 F.3d at 1358; *United States v. $215,300 United States Currency*, *supra*, 882 F.2d at 419 and n. 2; *United States v. Saperstein*, *supra*, 723 F.2d at 1232. The issue here, it is true, is not probable cause, but reasonable suspicion, because we are dealing with a stop rather than an arrest. But the Supreme Court has held that an uncorroborated anonymous tip, even when it comes from law enforcement authorities, does not by itself justify a stop. *United States v. Hensley*, 469 U.S. 221, 232, 105 S.Ct. 675, 682, 83 L.Ed.2d 604 (1985). The statement in *United States v. Troka*, 987 F.2d 472, 474 (7th Cir.1993), that "the police department was a reliable source," must be understood in context (the police department was a reliable source *in the circumstances of that case*), rather than as a quixotic effort to overrule the Supreme Court.

[4] That cannot be the end of our analysis, however. NADDIS furnished two tips, not one. "Ismael Ornelas," the name on the motel registry, was very similar to "Ismael Ornelas, Jr.," the name in NADDIS. And while the names Miguel Ornelas Ledesma and Miguel Ledesma Ornelas are as different from each other as Francis Scott Key and Francis Key Scott, the names could easily have been reversed in entering them in the computer, just as "Jr." could easily have been left off a motel registry. So there was some reason to believe that the registered owner of the Olds was the Miguel Ornelas Ledesma, or Miguel Ledesma Ornelas, identified by NADDIS as a suspected drug dealer. Even if NADDIS is not terribly reliable, some or for that matter many entries in it may be accurate or at least approximately so. And the fact that *both* the registered owner of the car *and* the name on the motel registry corresponded more or less to names of suspected drug dealers in the NADDIS database was impressive. One "hit" might well be coincidence; it was much less likely that two—one corresponding to the name in the hotel registry, presumably that of either the driver or the passenger; the other to the name of the registered owner, who might or might not be one of the two men in the motel—were, though this depends in part on how common the names "Ornelas" and "Ledesma" are. Paradoxically, the very unreliability of NADDIS (if it is unreliable) might strengthen the inference that the two men in the Olds were involved in the drug trade; inverting last and middle names is just the kind of mistake that one would expect in a carelessly maintained database. A mistaken premise can furnish grounds for a *Terry* stop, if the officers do not know that it is mistaken and are reasonable in acting upon it. *Illinois v. Rodriguez*, 497 U.S. 177, 184-86, 110 S.Ct. 2793, 2799-2800, 111 L.Ed.2d 148 (1990); *United States v. De Leon-Reyna*, 930 F.2d 396, 399 (5th Cir.1991) (en banc) (per curiam); *United States v. Walraven*, 892 F.2d 972, 974-75 (10th Cir.1989).

The tips were mutually corroborating; and the other circumstances on which the officers relied (the make and type of the car, the state it came from, etc), insufficient as they were by themselves to create a suspicion reasonable enough, substantial enough, to justify the infringement of personal liberty that is brought about by an investigative stop, may, when taken together with the NADDIS "tips," have tipped the balance in favor of a finding of reasonable suspicion. *United States v. Esieke*, 940 F.2d 29, 34 (2d Cir.1991), and *United States v. Morin*, 665 F.2d 765 (5th Cir.1982), factually similar cases although stronger for the government, so suggest. And the Supreme Court held in *Alabama v. White*, 496 U.S. 325, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990), that an anonymous tip can create reasonable suspicion if corroborated. The form the corroboration took in that case was verification of a prediction made by the informer, but there is no

magic in a particular form of corroboration. The circumstances that first aroused Pautz's suspicions were corroborative of the "anonymous tips" furnished by NADDIS in the sense that they made it likelier than otherwise that NADDIS was, in this instance anyway, accurate. Standing alone, the drug courier profile that first aroused Pautz's suspicions was very little. Standing alone, one NADDIS "hit" could not, in the absence of any evaluation of NADDIS's reliability, be thought much either. The second "hit," however, added to the credibility of the first; and together the profile and the "hits," though still not enough evidence of crime to furnish probable cause to search the car, could satisfy the lesser showing required for a *Terry* stop.

[5] Although the question is close, we conclude that the district court did not commit clear error in holding that there was a lawful stop. And clear error is the test; the proposition that review of a district court's determination of reasonable suspicion (if it is a *Terry* stop) or probable cause (if it is an arrest, search, or seizure) is plenary, embraced in such cases as *United States v. Caramillo*, 891 F.2d 620, 626 (7th Cir.1989), is no longer tenable after *United States v. Spears*, 965 F.2d 262 (7th Cir.1992), where, overruling inconsistent precedents, this court held that the standard for judicial review of determinations of probable cause was clear error. There is no basis for distinguishing in this regard between probable cause and reasonable suspicion. They are adjacent points on a continuum.

[6] Since the stop was lawful, we need not decide whether, had it been unlawful, the defendants' consent to search would nevertheless have been valid even though (a relevant factor, though not a decisive one, *Schneckloth v. Bustamonte*, 412 U.S. 218, 231–33, 249, 93 S.Ct. 2041, 2049–51, 2059, 36 L.Ed.2d 854 (1973)) the officers failed to advise the defendants of their right not to consent. *United States v. Valdez*, 931 F.2d 1448, 1451 (11th Cir.1991); *United States v. Valencia*, 913 F.2d 378, 381 (7th Cir.1990). But we do not think the denial of the motion to suppress the drugs seized from the door of the Olds can be upheld on the basis of the record compiled in the district court. The government does not argue that a *Terry* stop justifies so intrusive a search. The only lawful purpose of a search incident to a *Terry* stop is to protect the officers from the danger that the persons they have stopped will reach for a weapon, *Minnesota v. Dickerson*, — U.S. —, —, 113 S.Ct. 2130, 2136, 124 L.Ed.2d 334 (1993); *Michigan v. Long*, 463 U.S. 1032, 1049–51, 103 S.Ct. 3469, 3481–82, 77 L.Ed.2d 1201 (1983), and ordinarily and here the officers do not have to dismantle a car to satisfy themselves on that score. Nor does the government argue that the consent to search that Ornelas and Ornelas-Ledesma gave the officers was consent to dismantle the car. *United States v. Garcia*, *supra*, 897 F.2d at 1419–20; but cf. *United States v. Pena*, 920 F.2d 1509, 1515 (10th Cir.1990). The seizure was lawful, therefore, only if the search yielded information that gave Officer Luedke probable cause to believe that contraband was secreted behind the loose panel. If so, no search warrant was required, even for a search that would require taking the car apart. *United States v. Ross*, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982).

In arguing that there was probable cause for the search that discovered the drugs secreted in the car door, the government places great weight on the loose panel and the rusty screw. But the screw was not rusty. The magistrate judge to whom the motion to suppress was referred for a recommended ruling looked at the screw and found no indication of rust. The screw is in the appellate record and we have looked at it ourselves. There is not the slightest trace of rust or of anything that looks like rust. It is a Phillips screw and the head contains scratches that suggest it might have been removed and reinserted, but Luedke was adamant that it was signs of rust that caused him to believe that the panel had been removed recently and then put back in place. Having inspected the screw, the magistrate judge naturally disbelieved Luedke's testimony that the screw had looked rusty. Without discussing the bearing of Luedke's testimony about the loose panel on the issue of probable cause, the magistrate judge concluded that the seizure of the drugs had not been supported by probable cause. But noting the presence of the drug-sniffing dog, he found that the drugs would have been discovered anyway and therefore upheld the seizure on the ground of inevitable discovery. *Nix v. Williams*, 467 U.S. 431, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984).

The district judge upheld the seizure, too, but not on the magistrate judge's ground but rather on the ground that the allegedly loose panel alone, which the magistrate judge had not discussed, furnished probable cause. The government defends Luedke's testimony about the rust by arguing that it was dark inside the car (though it was broad daylight) and maybe the screw looked rusty though it wasn't; we are more accustomed to being told of the remarkable eyesight of the police that enables them to see tiny objects at great distances in the dark. *United States v. Sophia*, 900 F.2d 1064, 1073 (7th Cir.1990); *United States v. Gilliard*, 847 F.2d 21, 24 (1st Cir.1988); cf. *United States v. Pinto-Mejia*, 720 F.2d 248, 262 (2d Cir.1983). In any event, the magistrate judge was not required to believe Luedke or recast his testimony in a believable form.

[7] The magistrate judge concluded that Luedke did not have probable cause to seize the drugs; the district judge concluded that he did. Can we uphold the district judge's determination, in view of this disagreement? The standard for judicial review of a determination of probable cause is, as we have noted already, clear error; and this is so whether the determination is made by a magistrate judge or by a district judge. *United States v. Spears*, *supra*; *United States v. Adebayo*, 985 F.2d 1333, 1337 n. 2 (7th Cir.1993). A qualification is necessary, however, for the case in which the magistrate judge, rather than determining probable cause en route to issuing a warrant later challenged by a motion to suppress evidence seized pursuant to it, is merely recommending the disposition of a motion referred to him by a district judge to suppress evidence obtained as a result of a search, or an arrest, made without a warrant. In the first case, the relation between district judge and magistrate judge is that of reviewing court to court of first instance, and the usual standard of appellate review of findings of fact and of the application of a legal standard to such findings applies. In the second case—which is our case—not only may the district judge (with inapplicable exceptions) "accept, reject, or modify, in whole or in part, the [magistrate judge's] findings or recommendations," 28 U.S.C. § 636(b)(1); he is required "to make a de novo determination of those portions of the [magistrate judge's] report or specified proposed findings or recommendations to which objection is made." *Id.*

The question whether the district judge's power of de novo determination authorizes him to reject a magistrate judge's finding of credibility, without the district judge's hearing the witness himself, was left open in *United States v. Raddatz*, 447 U.S. 667, 681 n. 7, 100 S.Ct. 2406, 2415, 65 L.Ed.2d 424 (1980), though with a broad hint, picked up in *Proffitt v. Wainwright*, 685 F.2d 1227, 1237, 1241 (11th Cir.1982), that the answer is "no." See also *Grassia v. Scully*, 892 F.2d 16, 19–20 (2d Cir.1989); but cf. *LoConte v. Dugger*, 847 F.2d 745, 750 (11th Cir.1988). We need not answer the question here. Rather than reject the magistrate judge's finding that Luedke's testimony about the rusty screw should not be believed, the district judge found probable cause for the seizure in a part of Luedke's testimony that the magistrate judge had not relied upon—the testimony that the panel was loose. A number of cases, illustrated by *United States v. Lugo*, 978 F.2d 631, 637 (10th Cir.1992), treat a loose door panel as a telltale sign of drug running—but not as sufficient in itself to constitute probable cause. (In *United States v. Garcia*, *supra*, 897 F.2d at 1416, the officers saw packages peeping out from behind the loose panel.) The facts of this case show why. The car was eleven years old when Officer Luedke conducted the search. We mean no disrespect to Detroit in observing that the interior of a 1981 Olds unlike that of a Rolls Royce is apt to be rather worn and battered after eleven years. The fact that a door panel is loose does not by itself create a reasonable likelihood that the panel conceals a secret compartment containing contraband. *State v. Swanson*, 172 Ariz. 579, 838 P.2d 1340, 1345–48 (App.1992). Here as in most cases there was more, but not much more:

mainly the NADDIS "hits" of unproven reliability.

[8] We need not decide, however, whether the NADDIS hits (remember that there were two, and that this enhances their reliability), plus the fact that the defendants fit the drug courier profile, plus a loose door panel add up to probable cause—whether in other words the loose panel could turn reasonable suspicion into probable cause. For we do not know whether Luedke's testimony about the door panel should be believed. The only judicial officer who heard him testify was the magistrate judge, who failed to indicate whether he believed the testimony. Since the magistrate judge disbelieved a closely related part of Luedke's testimony, and the district judge did not overturn *that* credibility finding, it can hardly be *assumed* that the magistrate judge would surely have believed Luedke's testimony about the door panel, or that if he had disbelieved it would surely have been reversed by the district judge. Nor did the latter base his determination on a viewing of the car; there was no viewing. Even if, contrary to *Proffitt*, and to decisions involving the parallel case of administrative review of administrative law judges' credibility determinations, e.g., *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 495–97, 71 S.Ct. 456, 468–469, 95 L.Ed. 456 (1951); *NLRB v. Augusta Bakery Corp.*, 957 F.2d 1467, 1475–76 (7th Cir.1992); *Ortiz-Salas v. INS*, 992 F.2d 105, 108 (7th Cir. 1993), a district judge can reject a magistrate judge's determinations of credibility without hearing the witnesses' testimony himself, we do not think that he can be permitted to ignore the issue of credibility altogether. We do not think that he can accept challenged testimony given before another judicial officer without giving a reason for resolving the issue himself rather than referring the matter for initial determination by the other officer.

[9] This oversight would be academic if the magistrate judge's alternative ground for upholding the seizure—inevitable discovery by Luedke's dog—was so clearly correct that we could uphold it without the benefit of the district judge's views, as in *United States v. Lewis*, 621 F.2d 1382, 1387 (5th Cir.1980). We cannot. No evidence was presented concerning the dog's capabilities. For all we know he is an infallible sniffer of two kilograms of cocaine wrapped and hidden behind the door panel of a car; but we cannot take judicial notice of this fact. We don't know and have not been told anything about this dog except his name (Merlin), although our own research reveals that a Milwaukee drug-sniffing dog named Merlin, presumably the same beast, has on at least one occasion detected drugs in a piece of luggage when there weren't any. *Schaefer v. United States*, 656 F.Supp. 631, 632 (E.D.Wis.1987). If Merlin is *that* good, no doubt he could sniff the cocaine in the door of the defendants' car, but the government has not had the audacity to argue that a dog who can detect nonexistent drugs is an infallible inevitable discoverer of existent drugs. We may be too hard on Merlin; maybe he sniffed the residue of drugs in the luggage in the *Schaefer* case; maybe it was a different dog with the same name. But the government in its brief, without going so far to confess error on the magistrate judge's alternative ground (that is, inevitable discovery), does not defend it, even though defendant Ornelas had attacked it at some length in his opening brief. The government does not, for example, respond to Ornelas's damaging quotation from the testimony of Detective Hurrle: "I don't know if he [the dog] necessarily would have hit on this particular cocaine." (To which it can be added that we don't know whether the dog would have been directed to sniff in or about the car if Luedke's search had disclosed no suspicious circumstances.) We cannot affirm on a ground that has been waived, *Crane v. Indiana High School Athletic Ass'n*, 975 F.2d 1315, 1319 (7th Cir.1992); *Frederick v. Marquette Nat'l Bank*, 911 F.2d 1, 2 (7th Cir.1990), and the government has waived the defense of inevitable discovery by failing to defend the magistrate judge's determination. Perhaps it did this because it believed that the determination could not be defended. It put all its eggs in the probable-cause basket, and the eggs are broken.

The motion to suppress should not have been denied, though it is open to the government on remand to ask the district judge either to hear Luedke's testimony on the loose panel himself (or at least view the car's interior) or refer the matter to the magistrate judge for a determination of the credibility of that testimony. If Luedke's testimony is disbelieved, the motion to suppress should be granted. If it is believed, the district court must decide whether the loose panel, in conjunction with the NADDIS tips as corroborated by the circumstances that first aroused Officer Pautz's suspicions, adequately established probable cause to believe that drugs were concealed behind the panel. The court may wish to consider the evidence of the loose panel (if that evidence is believed) in conjunction with the Philips screw. For while it is plain that it is not rusty, it does look as if it had been scratched in just the way one would expect if it had been removed and reinserted, though its appearance could we suppose reflect its removal by Officer Luedke or other handling since. The test for probable cause is objective. It is not what the officer in question actually believed but what a reasonable officer in his position would have believed. *Scott v. United States*, 436 U.S. 128, 138, 98 S.Ct. 1717, 1723, 56 L.Ed.2d 168 (1978); *Mahoney v. Kesery*, 976 F.2d 1054, 1057–58 (7th Cir.1992). A reasonable officer would not have believed the screw rusty but might have believed it showed (other) evidence of having been removed and reinserted. That is a matter to be explored on remand.

The judgments of conviction are vacated and the case is remanded for further proceedings consistent with this opinion. The other grounds raised by the appellants have too little merit to warrant discussion.

VACATED AND REMANDED.

Walter SPEARMAN, Plaintiff-Appellant,

v.

EXXON COAL USA, INC.,
Defendant-Appellee.

No. 92-3837.

United States Court of Appeals,
Seventh Circuit.

Argued May 14, 1993.

Decided Feb. 11, 1994.

Former employee who was terminated due to excessive absenteeism brought retaliatory discharge claim in Illinois state court alleging that discharge violated employee's rights under Illinois workers' compensation laws. Employer removed case. The United States District Court for the Southern District of Illinois, William L. Beatty, J., entered judgment in favor of employer in accordance with jury verdict. Employee appealed. The Court of Appeals, Easterbrook, Circuit Judge, held that retaliatory discharge did not arise from workers' compensation law, so as to preclude removal of case to federal court.

Affirmed.

Ilana Diamond Rovner, Circuit Judge, dissented and filed opinion.

1. Removal of Cases ⇐3

Retaliatory discharge claim asserted by employee discharged due to excessive absence did not arise under "workmen's compensation laws" of Illinois, so as to preclude removal under federal statute; claim was fault based regime with common-law damages. 28 U.S.C.A. §§ 1441(a), 1445(c).

See publication Words and Phrases for other judicial constructions and definitions.

2. Removal of Cases ⇐3

Even case containing federal claim may not be removed if it also arises under state workers' compensation law. 28 U.S.C.A. § 1445(c).

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

JUDGMENT- WITHOUT ORAL ARGUMENT

Date: April 18, 1995

BEFORE: **Honorable** RICHARD A. POSNER, Chief Judge

Honorable JOEL M. FLAUM, Circuit Judge

Honorable DANIEL A. MANION, Circuit Judge

Nos. 94-3349 and 94-3350

UNITED STATES OF AMERICA,
Plaintiff - Appellee

v.

SAUL ORNELAS and ISMAEL ORNELAS LEDESMA,
Defendants - Appellants

Appeals from the United States District Court for the
Eastern District of Wisconsin
No. 92 CR 243, Rudolph T. Randa, Judge

The judgment of the District Court is AFFIRMED, in accordance with the decision of this court entered on this date.

(1060-110393)

OPPOSITION BRIEF

ORIGINAL

Supreme Court, U.S.
FILED
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No. 95-5257

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ISMAEL ORNELAS-LEDESMA AND SAUL ORNELAS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals, accepting the facts the district court found as not clearly erroneous, was required to review de novo the district court's determination that those facts demonstrated probable cause for a search.

2. Whether the district court properly declined to require the government to produce information relating to the reliability of the Drug Enforcement Agency's Narcotic and Dangerous Drug Information System (NADDIS).

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

No. 95-5257

ISMAEL ORNELAS-LEDESMA AND SAUL ORNELAS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals affirming petitioners' convictions (Pet. App. 147-148) is unreported, but the judgment is noted at 52 F.3d 328 (Table). The earlier opinion of the court of appeals vacating the convictions and remanding for further proceedings (Pet. App. 149-157) is reported at 16 F.3d 714. The opinions of the district court (Pet. App. 95-99, 110-11, 112-119) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 18, 1995. The petition for a writ of certiorari was filed on

July 17, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After entering conditional guilty pleas in the United States District Court for the Eastern District of Wisconsin, petitioners were convicted of possessing a controlled substance with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Petitioner Ornelas-Ledesma was sentenced to 60 months' imprisonment, and petitioner Ornelas was sentenced to 63 months' imprisonment. On petitioners' appeal from the denial of their motion to suppress, the court of appeals vacated the judgments of conviction and remanded for further proceedings. Pet. App. 149-157. On remand, the United States magistrate judge recommended that the motion to suppress be granted, but the district court sustained the government's objection to the magistrate judge's recommendation and denied the suppression motion. The court of appeals affirmed. Pet. App. 147-148.

1. The facts are set forth in the opinions of the court of appeals, Pet. App. 147-148, 149-157, and are not in dispute. While cruising through a motel parking lot in Milwaukee, Wisconsin, in 1992, Detective Pautz of the Milwaukee County Sheriff's Office spotted a 1981 two-door Oldsmobile with a California license plate. Based on his training and experience in drug interdiction, Pautz knew that narcotics traffickers often use older two-door General Motors cars because it is easy to conceal drugs in them, and that California is a "source" State

from which drugs are shipped to other States. Pautz asked his dispatcher to find out to whom the car was registered. The dispatcher responded either that the registered owner was Miguel Ledesma Ornelas or that he was Miguel Ornelas Ledesma -- Pautz was unsure whether the dispatcher indicated that the name "Ledesma" came before or after the name "Ornelas." Pet. App. 124, 150.

Believing that he had the name of the car's registered owner, Detective Pautz entered the motel and checked the registry, which showed that an Ismael (not Miguel) Ornelas and another man had registered at 4:00 a.m. Pautz called his partner, Detective Hurrle to join him. After Hurrle arrived, the two officers contacted the local office of the Drug Enforcement Agency (DEA) and asked it to run a check, through its Narcotic and Dangerous Drug Information System (NADDIS), on Miguel Ledesma Ornelas from San Jose and on Ismael Ornelas.[1] NADDIS reported two "hits," i.e. records of known or suspected criminal activity. One identified Miguel Ledesma Ornelas as a 47-year-old Hispanic male, five feet six inches tall and weighing 150 lbs., who was a suspected heroin dealer in El Centro, California. The other identified Ismael Ornelas, Jr., of Tucson, Arizona, as a suspected 1,000-kilogram-per-month cocaine dealer. The officers did not attempt to obtain further descriptions of the two suspected dealers. Pet. App. 125, 151.

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[1] NADDIS is a computerized compilation of DEA's information on known and suspected drug traffickers.

After a time, two men left the motel and got into the Oldsmobile. Detective Hurrle approached the car, identified himself as a police officer, and asked the men for identification. Saul Ornelas, the driver, produced a driver's license in that name. Ismael Ornelas-Ledesma, who was in the front passenger's seat, produced a driver's license in the name of Ismael Ornelas. After the two denied that there were any drugs in the car, Hurrle asked them if he could search the car, and they consented to the search. Pet. App. 151.

The search of the interior of the car was conducted by Officer Luedke, who had arrived in the meantime with a drug-sniffing dog. During his inspection, which he conducted without the aid of the dog, Luedke noticed a loose panel on the passenger-side door. One of the screws used to fasten the panel to the door was, according to Luedke, rusty, and he believed that the rust indicated that the screw had recently been removed.[2] Luedke pried the panel open, uncovering a package containing two kilograms of cocaine. The officers then arrested petitioners. Pet. App. 151.

2. Petitioners filed pre-trial motions to suppress the cocaine found in the car and to obtain discovery of printout copies of the results of the NADDIS checks and the "raw data" used to create the NADDIS entry. The magistrate judge found that

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[2] The court of appeals stated that Luedke did not explain the basis for his inference, but that "maybe the idea is that the removal of the screw would have scraped off its chrome coating, which protected it from rusting." Pet. App. 151.

petitioners were lawfully subjected to an investigatory detention based on reasonable suspicion, Pet. App. 134-135, and that they validly consented to the search of the car, id. at 135-136. See id. at 140. The magistrate judge concluded, however, that the consent did not extend to the removal of the door panel, and that a search behind the panel was not supported by the requisite probable cause. Id. at 136.[3] Nonetheless, the magistrate judge denied the suppression motion under the inevitable discovery exception to the exclusionary rule, concluding that the drugs inevitably would have been detected by the drug-sniffing dog. Pet. App. 137-138, 140.

The magistrate judge also denied petitioners' request for discovery in light of the government's representation that "neither NADDIS nor the motor vehicle license plate information were [sic] ever printed out from the computer." Pet. App. 120. The magistrate judge concluded that "[s]ince the materials which the defendants seek do not exist, they obviously cannot be disclosed." Ibid. The magistrate judge further concluded that petitioners had failed to show that the requested "raw data" qualified as exculpatory information within the meaning of Brady

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[3] The magistrate judge stated that "Luedke's clear testimony was that rust within the groove of the head of the Phillips screw holding the plastic vent cover in place caused him to believe it had been removed and drugs were concealed within the door panel. But, the screw itself belies this testimony. The record discloses no evidence from which Luedke could conclude that a hidden panel contained contraband. Consequently, the Court finds there was not probable cause to dismantle the panel." Pet. App. 136.

v. Maryland, 373 U.S. 83 (1963), or that it was discoverable under Fed. R. Crim. P. 16. Pet. App. 121.

The district court accepted the magistrate judge's recommendation that the suppression motion be denied, but on a different theory. Pet. App. 112-119. The court agreed with the magistrate judge that the investigatory stop and consent search were valid, but concluded that it was unnecessary to invoke the inevitable discovery doctrine because, in its view, the search behind the door panel was supported by probable cause. The district court found that the drug courier profile (i.e. the model and State of origin of the car and the fact that two men traveling together checked into the motel at 4:00 a.m.), the two NADDIS "hits," and the loose door panel constituted probable cause to remove the door panel and search for drugs. Id. at 116-118. The district court also upheld the magistrate judge's denial of petitioners' discovery motions as not "clearly erroneous." Id. at 110-111.

3. The court of appeals, following United States v. Spears, 965 F.2d 262 (7th Cir. 1992), applied a clear-error standard of review to the district court's determinations of reasonable suspicion and probable cause. The court held that the district court did not commit clear error in ruling that the stop was supported by reasonable suspicion, although it regarded the question as "close." Pet. App. 154. Because the reliability of the information stored in NADDIS was unknown, the court treated a NADDIS "hit" as no more reliable than a tip from an informant not

known to be reliable -- that is, as insufficient without corroboration to support a stop. Id. at 153. The court concluded, however, that there was sufficient corroboration to establish reasonable suspicion. The corroborative facts included the make and age of the car, its "source state" origin, the 4:00 a.m. motel check-in without advance reservations, and the fact that the two NADDIS "hits," although ultimately proving to have identified individuals other than the petitioners, appeared to the officers at the time to be mutually reinforcing. Id. at 151.

The court of appeals was satisfied that the facts reflected grounds for a reasonable suspicion, but held that they did not support the determination of probable cause to remove the door panel. Pet. App. 154-155. The key fact informing the district court's probable cause ruling was Officer Luedke's testimony that the door panel was loose, id. at 117, but the magistrate judge had not made any finding as to the credibility of that testimony, id. at 127.[4] Accordingly, the court of appeals vacated the convictions and remanded the case to the district court for further proceedings, stating that

> it is open to the government on remand to ask the district judge either to hear Luedke's testimony on the loose panel himself (or at least view the car's interior) or refer the matter to the magistrate judge for a determination of the credibility of that testimony. If Luedke's testimony is disbelieved, the motion to suppress should be granted. If it is believed, the district court must decide whether the

[4] The court held that the government had waived the inevitable discovery claim, and that, in any event, it could not have accepted that claim in the absence of evidence regarding the dog's capabilities and intended use. Pet. App. 156.

> loose panel, in conjunction with the NADDIS tips as corroborated by the circumstances that first aroused Officer Pautz's suspicions, adequately established probable cause to believe that drugs were concealed behind the panel.

Id. at 156-157.

The court of appeals rejected petitioners' other claims, including their challenge to the denial of their discovery motions, as "hav[ing] too little merit to warrant discussion." Pet. App. 157.

4. On remand, the district court referred the matter to the magistrate judge for an initial determination, and the magistrate judge recommended that the suppression motion be granted. Pet. App. 100-107. The parties stipulated to resolution of the matter on the existing record. Id. at 106. The magistrate judge expressly accepted the credibility of Officer Luedke's testimony that the door panel was loose, but concluded that "the loose panel alone, given the age of the Oldsmobile, is not probative evidence of the fact it necessarily had been recently removed." Id. at 102-103. The NADDIS "hits" and other factors alone were not, in his view, sufficient to establish probable cause to remove the panel. Id. at 107.

The district court rejected the magistrate judge's recommendation and denied the suppression motion, affirming its own initial determination that probable cause had been established. Pet. App. 95-99. The court commented that, "viewed individually," the facts "may be unremarkable," but "they become more meaningful when, in a specific case, they converge and form

around two specific individuals." Id. at 97. The district court viewed the loose door panel as "the final fact in a string of unbroken facts which establishes the probable cause equation." Id. at 99.

5. On appeal after remand, the court of appeals, applying the "clear error" standard of review, upheld the district court's determination that the removal of the door panel was supported by probable cause. Pet. App. 147-148. The court stated that the district court's opinion "adequately reviews the circumstances on which the decision to search the car was based and explains why taken as a totality they gave the officers probable cause to conduct the search." Ibid.

ARGUMENT

1. Petitioners contend that, in affirming the district court's rulings that the investigative stop was supported by reasonable suspicion and that removal of the car door panel was supported by probable cause, the court of appeals used the wrong standard of review, and that the ruling should have been reviewed de novo instead of for clear error. Pet. 11-32.

a. There is a conflict among the circuits on the proper standard of review of determinations of probable cause and reasonable suspicion. Several courts of appeals have held that whether particular facts constitute probable cause or reasonable suspicion is a legal issue subject to de novo review. See, e.g., United States v. Puerta, 982 F.2d 1297, 1300 (9th Cir. 1992); United States v. Ramos, 933 F.2d 968, 972 (11th Cir. 1991), cert.

denied, 503 U.S. 908 (1992); United States v. Patrick, 899 F.2d 169, 171 (2d Cir. 1990); United States v. Hoyos, 892 F.2d 1387, 1392 (9th Cir. 1989), cert. denied, 498 U.S. 825 (1990); United States v. Ishmael, 48 F.3d 850, 853 (5th Cir. 1995); United States v. Martinez-Perez, 941 F.2d 295, 297 (5th Cir. 1991), cert. denied, 503 U.S. 920 (1992). The First Circuit, like the Seventh, appears to apply the "clearly erroneous" standard, but without distinguishing between the factual and legal aspects of a probable cause determination. See, e.g., United States v. Santana, 895 F.2d 850, 852 (1st Cir. 1990). In other courts, the cases have not followed a uniform approach. Compare United States v. McGlory, 968 F.2d 309, 342 (3d Cir.) (clear error), cert. denied, 113 S. Ct. 415, 627, 1388 (1992), with United States v. Edwards, 53 F.3d 616, 618 (3d Cir. 1995) (de novo); United States v. Williams, 10 F.3d 1070, 1074 (4th Cir. 1993) (de novo), cert. denied, 115 S. Ct. 313 (1994), with United States v. Porter, 738 F.2d 622, 624 (4th Cir.) (en banc) (clear error), cert. denied 469 U.S. 983 (1994); United States v. Padro, 52 F.3d 120, 122 (6th Cir. 1995) (de novo) with United States v. Hofstatter, 8 F.3d 316, 322 (6th Cir. 1993) (clear error), cert. denied, 114 S. Ct. 1101 (1994); United States v. Travis, 993 F.2d 1316, 1324 (8th Cir.) (clear error), cert. denied, 114 S. Ct. 229 (1993), with United States v. Turpin, 920 F.2d 1377, 1384 (8th Cir. 1990) (de novo), cert. denied, 499 U.S. 953 (1991); United States v. Kopp, 45 F.3d 1450, 1452 (10th Cir. 1995) (de novo), cert. denied, 115 S. Ct. 1721 (1995), with United States v. Fox,

902 F.2d 1508, 1513 (10th Cir.) (clear error), cert. denied, 498 U.S. 874 (1990).

We agree with petitioners that a district court's conclusion that certain facts amount to probable cause is subject to de novo review. The question whether an arrest is supported by probable cause is a mixed question of law and fact -- that is, a question "in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated." Pullman-Standard v. Swint, 456 U.S. 273, 289 n.19 (1982). Thus, a district court's findings of "historical facts" may be reversed on appeal only where the findings are "clearly erroneous." See, e.g., Maine v. Taylor, 477 U.S. 131, 145 (1986). But the application of the legal standard of probable cause to those facts presents a question of law, and on that issue appellate review should not be similarly circumscribed. Cf. Arizona v. Fulminante, 499 U.S. 279, 287 (1991) (regarding voluntariness of a confession, reviewing court shows deference to factual findings but "the ultimate issue of 'voluntariness' is a legal question" requiring "independent" determination); Miller v. Fenton, 474 U.S. 104, 110, 117 (1985) (same); Ker v. California, 374 U.S. 23, 33-34 (1963) (review of state court determination of constitutionality of search requires "an independent examination of the facts, the findings and the record" to determine whether the search was reasonable).

In adopting its rule that probable cause determinations should be reviewed for clear error, the Seventh Circuit relied on Illinois v. Gates, 462 U.S. 213 (1983). See United States v. Spears, 965 F.2d 261, 269-272 (7th Cir. 1992).[5] Gates instructed that, in cases in which a magistrate has determined that an affidavit shows probable cause and has issued a warrant, "after-the-fact scrutiny by courts of the sufficiency of [the] affidavit should not take the form of de novo review"; rather, "[a] magistrate's 'determination of probable cause should be paid great deference by reviewing courts.'" 462 U.S. at 236 (quoting Spinelli v. United States, 393 U.S. 410, 419 (1969)). Reviewing courts need only ensure that the issuing magistrate judge had a "substantial basis" to conclude that probable cause existed, id. at 238-239 -- a standard of review that the Seventh Circuit treats as equivalent to review for clear error. Spears, 965 F.2d at 270. Because the standard applicable to an initial determination of probable cause is the same in both warrant and nonwarrant cases, the Seventh Circuit concluded that "it would be anomalous to require a more searching review of a district judge's probable cause determination" in nonwarrant cases than of the issuing magistrate's determination in warrant cases. Id. at

[5] In Spears, the Seventh Circuit took note of confusion in its precedents regarding the proper standard of review and set out its basis for adopting a deferential approach in both warrant and nonwarrant cases. 965 F.2d at 268-269. The court observed that, "[b]ecause this decision changes the law of the circuit, we have circulated this opinion to all active judges * * *. A majority of the judges has voted not to rehear the case en banc." Id. at 269 n.2.

270. Accordingly, the court took the view that the "clearly erroneous" standard applies in both contexts.

The Seventh Circuit's reasoning ignores this Court's rationale in Gates for reaffirming the principle of deference to a magistrate judge's finding of probable cause to issue a warrant. The deferential standard of review applied to the probable cause determination of a magistrate who has issued a warrant reflect "the Fourth Amendment's strong preference for searches conducted pursuant to a warrant," 462 U.S. at 236, and thereby "serves the purpose of encouraging recourse to the warrant procedure," id. at 237. If warrants were due no greater deference than judicial probable cause determinations in non-warrant cases, "police might well resort to warrantless searches, with the hope of relying on consent or some other exception to the Warrant Clause that might develop at the time of the search." Id. at 236. That rationale for deference to probable cause determinations plainly does not apply in cases involving warrantless searches.

b. The question whether a de novo or deferential standard of review should apply to a district court's determination that a warrantless search was justified by probable cause may merit this Court's review in an appropriate case. In Baron v. United States, No. 88-6448, the government suggested that the Court grant the petition to address that issue, but the Court denied review. 490 U.S. 1040 (1989). Subsequently, in a case that raised the same issue, the government reiterated that the de novo

standard is correct, but opposed certiorari on the ground that the outcome would not be affected by the standard of review applied; this Court nevertheless granted the petition, vacated the judgment, and remanded the case to the Sixth Circuit for further consideration in light of the position asserted by the Solicitor General. Williams v. United States, 500 U.S. 901 (1991). On remand, the Sixth Circuit viewed itself as bound by circuit precedent to apply a clearly erroneous standard and did not reexamine that issue. The court determined, however, that the probable cause determination would be upheld under either a de novo or a deferential standard, and the court accordingly reaffirmed its prior judgment. Williams v. United States, 949 F.2d 220, 221-222 (1991). This Court denied certiorari. 504 U.S. 958 (1992).

While the Court could follow the same course as it followed in Williams, we suggest that the better approach is to deny the petition outright. As in Williams, we submit that the district court's reasonable suspicion and probable cause determinations were correct and should be upheld under either standard of review. There was ample corroboration of the NADDIS hit -- the age and make of the car, its "source" state license, and the late hour of the unreserved motel check-in -- to support a reasonable suspicion of criminal activity. And those facts, when considered with the discovery of the loose panel in the car door that could readily conceal drugs, supplied probable cause for the search. Indeed, while the court of appeals in this case said that the

clear error test was controlling under circuit precedent, as had the government in its brief on appeal (see Gov't C.A. Br. 21-22), the court's careful examination of the particular facts that bore on probable cause closely resembles the inquiry that would occur in reviewing a probable cause determination de novo. See Pet. App. 151-157. Accordingly, the outcome of this case is not likely to change, regardless of the standard applied. In those circumstances, we believe that the petition should be denied.[6]

2. Petitioners contend that the district court improperly refused to compel the government to produce NADDIS printouts of, and the raw data underlying, the two NADDIS "hits." Pet. 32-49. Relying on Brady v. Maryland, 373 U.S. 83 (1963) (see Pet. 43), they assert that they needed the NADDIS data in order to be able to undercut the reliability of the NADDIS "hits" as factors supporting the stop and search of their car. Petitioners did not preserve that issue for appellate review when they entered their conditional guilty pleas. See Gov't C.A. Br. 1. In any event, review of that factbound claim is not warranted.

It is questionable whether Brady applies in the suppression context. Under Brady, the prosecution's failure to turn over evidence favorable to the accused upon request violates due

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[6] We do not believe the Court should hold the instant petition pending its decision in Thompson v. Keohane, No. 94-6615 (cert. granted, Jan. 23, 1995), which raises the question of the correct standard of review -- de novo or "clearly erroneous" -- in a federal habeas corpus proceeding of a state court's determination that a suspect was in custody for purposes of the Miranda rule. It is unlikely that the decision in Thompson will control the disposition of this case, which does not arise in a habeas context, and addresses probable cause rather than custodial status.

process where "the evidence is material either to guilt or to punishment." 373 U.S. at 87. The inquiry into whether the government obtained evidence in violation of the Fourth Amendment does not bear on the ultimate question of guilt or innocence.

But regardless of the proper analysis of that issue, petitioners have not shown that Brady would have been violated here. Because "the reliability of information stored in NADDIS [wa]s unknown," Pet. App. 153, the court of appeals substantially discredited the NADDIS "hits," treating them as "no more reliable than [tips from] an informant not known to be reliable." Ibid. Pet. App. 153. In view of that treatment, the only discovery potentially material to the issues at the suppression hearing would have been information showing the "hits" to be so patently unreliable that a reasonable officer on the scene would have given them even less credence than did the court of appeals. Petitioners rely on mere speculation that they could have further discredited the information (see Pet. 41), and speculation is insufficient to support a Brady claim. See United States v. Agurs, 427 U.S. 97, 109-110 (1976) ("The mere possibility that an item of undisclosed information might have helped the defense * * * does not establish 'materiality' in the constitutional sense."); United States v. Carson, 9 F.3d 576, 583 (7th Cir. 1993), cert. denied, 504 U.S. 926 (1992); United States v. Driscoll, 970 F.2d 1472, 1482 (6th Cir.), cert. denied, 113 S. Ct. 1056 (1993); United States v. Pitt, 717 F.2d 1334, 1338-1339 (11th Cir.), cert. denied, 465 U.S. 1068 (1984).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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